



*R. White sculp.*

*IOHANNES  
Miles Capitalis  
Banco.*



*VAUGHAN  
Iust. de Com:  
Año: 1674.*





*R. White sculp.*

*IOHANNES  
Miles Capitalis  
Banco.*



*VAUGHAN  
Iust. de Com:  
Año: 1674.*

T H E  
R E P O R T S  
A N D  
A R G U M E N T S

O F T H A T  
L E A R N E D J U D G E  
S i r J O H N V A U G H A N K<sup>t</sup>  
L A T E  
C h i e f J u s t i c e o f H i s M a j e s t i e s C o u r t  
O F  
C o m m o n P l e a s .

B E I N G  
A l l o f t h e m S p e c i a l C a s e s , a n d m a n y w h e r e i n  
h e P r o n o u n c e d t h e R e s o l u t i o n o f t h e  
w h o l e C o u r t o f *C o m m o n P l e a s* ;  
A t t h e t i m e h e w a s C H I E F J U S T I C E t h e r e .

---

P u b l i s h e d b y h i s S o n  
E D W A R D V A U G H A N E s q ;

---

L O N D O N ,  
P r i n t e d b y *Thomas Roycroft* f o r *Richard Marriott*, t o b e s o l d b y *Thomas*  
*Bassett* a n d *George Marriott*, a t t h e i r S h o p s i n *Fleetstreet*  
a n d i n *Westminster-Hall*. M D C L X X V I I .

THE  
OFFICE OF  
THE  
CLERK OF THE  
SUPREME COURT

FOR THE  
STATE OF  
NEW YORK  
IN SENATE  
JANUARY 1880  
Chief Clerk of the Court

COMMON SENSE  
AND  
REASON  
ARE THE  
BEST  
GUIDES  
TO  
TRUTH  
AND  
JUSTICE

AND BY THE  
AUTHORITY OF THE  
LEGISLATURE  
OF THE  
STATE OF  
NEW YORK  
PRINTED  
AT THE  
OFFICE OF THE  
CLERK OF THE  
SUPREME COURT  
IN SENATE  
JANUARY 1880



TO THE  
READER.



Refaces to *Books*, if written by other *Hands* than the *Author's own*, are for the most part *Panegyricks*, and lean more to *Flattery* than *Truth*; the *Writers* of them taking more pains to describe themselves, than the *Author*

A

thor



---

## To the Reader.

---

*thor* of the *Book*. If they write *Elegantly* enough, or strain sufficiently in his *praise*, they captivate the *Reader* ( or at least conceive so ) into a *good Opinion* of themselves ; but the *sufficiency* of the *Author* must still appear from his *own Work*.

This therefore shall be, First, only such a brief Account of the *Author*, as is usual of *Persons* of his *Station* upon the like *Occasion* : And Secondly, the *Reason* why these *Papers* see the *Light* ; which I conjecture the *Author* intended should have *died* with him ; or *survived* him in very few *Hands*, and those such as he had a *particular esteem* for.

He was the *eldest Son* of *Edward Vaughan* Esquire, and *born* on the Fourteenth of *September*, in the Year of our Lord 1603.

at

---

## To the Reader.

---

at *Trowscoed* in the County of *Cardigan*, the *Ancient Seat* of his *Family*, himself being the *Eleventh* of that *House* in a direct *Line*.

About the *Tenth* year of his *Age* he was sent to be *Educated* at a *Publique School* in the *City* of *Worcester*, and about the *Fifteenth* removed from thence to *Christ-Church* in *Oxford*; where, although he had a *Tutor* of the said *Colledge*, yet the *Education* of him was more especially committed to an *Uncle* of his own by his *Fathers* side, then a *Fellow* of *All-Souls Colledge* in *Oxford*, who being a *person* of good *Learning* and *Prudence*, omitted nothing that might cherish the *hopes* he entertain'd of his *Nephew*, and improve him in all *kinds* of *Learning* with which the *University* doth *season Youth*. This *Care* of his *Uncles* he would frequently commemorate to his *Last*.

---

## To the Reader.

---

About the Eighteenth year of his *Age* he was removed to *London*, and on the Fourth of *November*, in the Year 1821. admitted of the *Inner Temple*, where I have often heard him say, that he addicted himself to *Poetry*, *Mathematicks*, and such more *alluring Studies* at first, neglecting that *severer* of the *Laws* of *England*, until he became acquainted with that *incomparable Person* Mr *J. Selden*, who discerning in him a *ready Wit*, and *sound Judgment*, did studiously afford him *Occasion* of making a right use of two such *excellent Ingredients*, and frequently admitted him to the *Converse* of *himself*, and other *worthy Persons* his *Cotemporaries*, where having been *instructed* in the value of *Civil Learning*, he soon after apply'd himself closely to that *Course* of *Study*, and more particularly of the *Laws* of *England*, which he after made his *Profession*.

His

---

## To the Reader.

---

His *Practice*, after he was call'd to the *Bar*, was for the most part in the *Star-Chamber*, where he soon became *Eminent*.

He was elected *Burges*s for the *Town* of *Cardigan*, to serve in the *Parliament* Conven'd on the *Third* of *November*, 1640. where he gave sufficient *Testimony* his *Learning* was not confin'd within the *Walls* of *Westminster-Hall*, but that he was possess'd of great *Publique Abilities* likewise.

Soon after King *Charles* the First withdrew from *White-Hall* to *Hampton-Court*, and that the *Rent* between Him and the *Parliament* was too too visible, being no longer able to serve his *Prince* there, he left the *House* of *Commons* (whence he, among other *Worthy Members*, was not long after *Secluded* by *Vote* of that *House*, and a *new Writ* issued forth for  
the



---

## To the Reader.

---

the *Election* of a *Member* in his place) and he betook himself to those *Duties* wherein he was capable of serving his *Prince* in his proper *County*.

From the Year 1641. in which he retir'd from the *Parliament*, until the Year 1660. in which God blessed us with the *Restoration* of our present *King*, he did in a manner quit his *Profession*: For in that time he never received a *Fee* from any Person whatever, nor could be prevail'd with to appear in any *Court*, although exceedingly importun'd to it by such as had a desire to make use of his *Abilities*: And the reason I have heard him assign for it, was, *That it was the Duty of an honest Man to decline, as far as in him lay, owning Jurisdictions that derived their Authority from any Power, but their lawful Prince.*

Private

---

## To the Reader.

---

Private Counsel he frequently imparted , but that was either *gratuitously* to such of his *Acquaintance* as he had a great *Esteem* for , or *charitably* to such as were not at all, or not well able, to *Fee* other *Council*.

Thus for the most part for Twenty years together, he pass'd a retir'd Life at his *own Country House*, until he was Elected to serve as *Knight* of the *Shire* for the County of *Cardigan* in this present *Parliament*, begun the Eighth Day of *May*, in the Year 1661. and on the Twentieth of *May*, 1668. his *Majesty*, whose *Goodness* is ever Extensive to *worthy Men*, did by his *Commission* under the *Great Seal*, constitute him *Chief Justice* of the *Court* of *Common Pleas*, in which *Employment* he died on the Tenth of *December*, in the Year 1674. Leaving these *Remains* of his *Labours* in that *Court*, which having no particular *Direction*  
from

---

## To the Reader.

---

from the *Autor* to that purpose, I did for some time resolve should not have been made Publique, although I well understood the value of some of them, wherein there are *Questions* handled, not familiar in any of our *Reports* yet extant; but in their Nature more Publique.

This *Resolve* of mine being imparted to some *Learned Gentlemen* of the *Coyf*, and others who had a particular esteem for the *Autor*, begot *Importunities* for *Copies* of several of those *Arguments* then in my hands, which were procured, and soon after, by what means I know not, dispersed further than I intended them, and as I have been informed, Cited as *Authorities*.

Thus having, without my privity, become so Publique, and apprehending that things in them-

---

## To the Reader.

---

themselves *good, innocent, and useful*, may by mis-application become dangerous, and disgusting, I conceived it best to procure a *Licence* for them to speak for themselves, that they may bear their own blame, and that such as make use of them may have no further share in the Guilt (if any such be) than that they have done as others do, that is, *Quoted Authority*.

Which I conceive may be done with safety; most of the subsequent *Cases* being not the *single Opinions* of the *Author*, but the *Resolutions* of the *whole Court* by him delivered. If in some few other *Cases* it hath been his Fate in any thing to differ from his *Bretbren*, it is no more than many of his *Predecessors* have done; particularly that most *Learned and Reverend Judge*, the Lord *Hobart*, whose *single Opinions* in many *Cases* published, being built upon *excellent Reason*, carry

B

great



---

## To the Reader.

---

great weight with them at this day : whether the *Autor* may be so *fortunate*, Time must determine. But I hope such as shall think fit to *oppose* such of his *Opinions* wherein he is *singular* , will first Reverse the *Reasons* of them ; for if they be not vanquish'd, the *Conclusions* thence deduc'd must prevail. So *Reader*, I commit him to you, heartily wishing you the benefit design'd by this Publication.

W. E. all knowing the great  
importance of the subject, and in  
consequence of the various  
Committee Report, after the  
issuing of these Report, and  
gunners in the line of  
now they are

Finch C.  
R. H. R. R. R.  
The T. W. R.  
H. M. R.  
H. M. R.  
T. M. R.  
H. M. R.  
R. M. R.  
Edward T. R.  
V. M. R.  
The T. R.  
Will S. R.

**W**E all knowing the great Learning, Wisdom, and Integrity of the Author, Do, for the Common Benefit, allow the publishing of these Reports and Arguments in the same Letter as now they are Printed.

Finch C.  
Ri. Raynsford.  
Fra. North.  
Tho. Twifden.  
W. Montagu.  
W. Wylde.  
Tim. Littleton.  
Hugh Wyndham.  
Rob. Atkyns.  
Edward Thurland.  
V. Bertie.  
Tho. Jones.  
Will. Scroggs.

# REPORTS

O F

## Sir John Vaughan

LORD CHIEF JUSTICE

Of the COURT of

### COMMON-PLEAS.

Hil. xvii. & xviii. Caroli 2. Reg. C.B. Ro. 1032.

<i>John Tuston Knight</i>	} Plaint.	{ <i>Rich. Temple Knight of the</i> <i>Bath and Bar.</i> <i>Chamberlain Hammerley Cl.</i> <i>John Bish. of Lich. and Cov.</i>	} Defens.
<i>and Baronet.</i>			

In a *Quare Impedit* for hindring him to present a fit Person to the Vicaridge of the Church of *Burton-Basset* in the County of *Warwick*, being void, and belonging to his Gift.



**C** Plaintiff sets forth, That whereas Thomas Temple Kt. and Bar. was seised of two third Parts of the Mannor of *Burton Basset*, to which one third Part of the Advowson of the Vicaridge aforesaid; that is, to present a fit Person to the same Vicaridge the first time, when the same then after should happen next to be void: And after the same first Presentation, then every third turn of the same Vicaridge being void for ever appertains, and did appertain, in his Demesne as of Fee.

B

And



And one Edward Wootton Kt. Lord Wootton, was seised of one other third part of the Mannor aforesaid, and of one third part of the Rectory Improprate of Burton Bassett: To which third parts one other third part of the Advowson of the Vicaridge aforesaid: that is, to present a fit Person to the same Vicaridge the second turn, when the same Vicaridge then after should happen next to be void: And after the same second Presentation, then every third turn of the same Vicaridge being void for ever both appertain, and then did appertain, in his Demesne as of Fee.

That the said Thomas Temple was likewise seised of another third part of the Advowson of the Vicaridge aforesaid, that is, to present a fit Person to the same the third turn, when the same Vicaridge then after should happen next to be void: And after such third Presentation, then every third turn of the same Vicaridge being void for ever. Ut de uno grosso per se, ut de secundo & jure.

That the said Thomas Temple being seised of the two third parts of the said Mannor: To which, &c. the said Vicaridge became void by the resignation of Thomas Freeman then last Incumbent.

That thereupon the said Thomas Temple presented in his turn to the said Vicaridge one John Reignalds his Clerk, who was admitted, instituted and inducted thereto, in the time of the late King James.

That the said Edw. Wootton, being seised of the said other third part of the said Mannor, and third part of the Rectory aforesaid, to which, &c. dyed thereof so seised at Burton Bassett aforesaid.

That after his death the said third Parts, to which, &c. descended to one Thomas Lord Wootton his Son and Heir, whereby the said Thomas Lord Wootton became thereof seised in his Demesne, as of Fee

That being so seised, he levied a Fine of the said third Parts, to which, &c. in the Common-Pleas 4. Car. 1. in o&ab. S. Martini to Nicholas Pay Esq; and Reignald Pay Gent. Com-Plainants, the said Lord Wootton, Mary his Wife, and one Henry Wootton Knight deforc.

That the said Fine was to the use of the said Lord Wootton and Mary his Wife, during their natural lives, and the longer liver of them. Then to the use of the first Son of the body of the Lord Wootton, and the Heirs Males of the body of such first Son begotten, and so to the sixth Son successively and the Heirs Males

Heirs of their bodies, and ſo to every other the Heirs of the ſaid Lord Wootton ſucceſſively.

Then for default of ſuch iſſue, to the uſe of Margaret Wootton third daughter of the ſaid Lord Wootton, and Mary his Wife, and of ſuch Husband with whom the ſaid Margaret ſhould happen to marry for term of ſuch husbands natural life (If the ſaid Margaret ſhould ſo appoint the ſame per aliquod ſcriptum ſub manu & ſigillis ſuis): And of the Heirs Heirs of her body begotten for part of her marriage portion, then to the uſe of the Heirs of her body begotten: And for default of ſuch, to the uſe of the right Heirs of the ſaid Thomas Lord Wootton for ever.

That by the ſaid Fine and Statute of Uſes, the ſaid Lord Wootton and Mary his wife were ſeiſed of the ſaid two third parts to which, &c. for their Lives with the Remainders over as aforeſaid.

That being ſo ſeiſed the ſaid Vicaridge became void by the death of the ſaid John Reignolds: And the ſaid Lord Wootton preſented to the ſame in his turn one John Cragg, who was accordingly inſtituted and inducted tempore Car. 1.

That the ſaid Tho. Temple, being ſeiſed of the other third part of the ſaid Advowſon in groſs leſſed a Fine among other things of the ſaid third part of the ſaid Advowſon to Edward Peeter, and Thomas Peeter Eſquires, Complainants, and the ſaid Thomas Temple and Heſter his wife being deſorceants

That this Fine was ſo leſſed to the uſe of one William Peeter Eſq; and his Heirs.

That the ſaid William Peeter, being ſeiſed by vertue of the ſaid Fine and Statute of Uſes, the ſaid Vicaridge became void by the Reſignation of the ſaid John Cragg and the ſaid William Peeter preſented in his turn thereto one Robert Kenrick his Clerk, who was accordingly admitted, inſtituted and inducted tempore Car. 1.

That the ſaid Tho. Temple being ſeiſed of the ſaid two third parts of the ſaid Mannor, to which, &c. dyed ſo ſeiſed at Burton Baſſet aforeſaid.

That after his death the ſaid two third Parts to which, &c. deſcended to one Peter Temple his Son and Heir, who was thereof ſeiſed, and dyed ſo ſeiſed.

That after his death, the ſame deſcended to the ſaid Richard Temple his Son and Heir, who was, and yet is, ſeiſed of the ſaid two third Parts

That being ſo ſeiſed, the ſaid Vicaridge became void by the death of the ſaid Robert Kenrick, which vacancy was the third vacancy of the ſaid Vicaridge after the ſaid firſt Preſentation of the ſaid Thomas Temple.

That

That the said Richard 12. Decembris anno 1654. presented to the said Vicaridge in his turn one Richard Mansell his Clerk, who upon his Presentation obtain'd the said Vicaridge, and was in actual possession thereof, and so being in possession a Statute was made the 25th. of April 12. of the King for confirmation and establishing of Ministers in their Ecclesiastick Possessions, ordained by any Ecclesiastick Persons before the 25th of December, then last past: And that the said Richard Mansell by vertue of the said Statute was real and lawful Incumbent and Vicar of the said Vicaridge.

That the said Lord Wootton and Mary his Wife being seised of the said third part of the said Mannor and Rectory aforesaid for their lives with remainder, as aforesaid, the said Lord Wootton so seised dyed at Burton Bassett aforesaid.

That the said Mary survived him, and was thereof sole seised for term of her life by Survivorship And being thereof so seised with Remainder, as aforesaid.

The said Margaret married the said John Tuston, and after the 8th. day of August 22. Car. 1. By a writing under her hand and seal produc'd in Court by the said John Tuston dated the same day and year appointed, that the said Fine leav'd as aforesaid in the 4th. year of the King should be, and the Conusees therein named should stand seised of the said third part, to the use of the said Margaret, and of the said John Tuston for term of his life, as by the said writing more fully appears.

By vertue of the said Fine and Statute of uses, the remainder of the said third part, after the death of the said Mary belong'd to the said John Tuston and Margaret for term of the said Johns life with remainder as aforesaid.

That the said Mary being seised of the said third Part with remainder over as aforesaid, the said Margaret at Burton Bassett aforesaid, dyed without issue of her body, and the said John Tuston survived her.

That the said Mary afterwards at Burton Bassett aforesaid dyed seised of such her Estate, after whose death the said third part remain'd to the said John Tuston, who was thereof seised for term of his life with remainder over to the Heirs of the Lord Wootton.

That the said Tuston being so seised in a Statute made at Westminster begun the 8th. day of May in the 13th. year of his reign and there continued until the 19th. of May in the 14th. year of his reign: It was among other things enacted, That Parsons, Vicars, and other Churchmen being Incumbents of any Ecclesiastical Living should

should subscribe the Declaration or Recognition set forth in the said Act in manner as by the said Act is recited (which is set forth at large in the Pleading) upon pain of forfeiting the said Parsonage, Vicaridge, or other Ecclesiastical Living, and to be *ipso facto* deprived of the same.

And the said John Tufson in fact saith, that the said Richard Mansell was in possession of the said Vicaridge of Burton Bassett, and did not, as by the Act was required, subscribe the said Declaration, whereby he stood *ipso facto* deprived, and the said Vicaridge became void.

That such vacancy of the said Vicaridge is the third vacancy thereof, after the aforesaid Presentation of the said Lord Wootton, and therefore it belongs to the said John Tufson to present a fit Person to the same, and that the said Bishop, Richard Temple and Chamberlayne do hinder him so to do to his damage of fifty Pounds.

The said Bishop and Richard Temple plead in Bar. And first the said Bishop, That he claims nothing, but as Ordinary.

Then the said Richard Temple saith, the said Tufson ought not to have his Action against him, and taking by Protestation, that the said Tufson was not seised in his Demesne, as of Freehold for Term of his life of the third part of the said Mannor of Burton Bassett, and of the third part of the said Rectory of Burton Bassett aforesaid, for Plea saith,

That he the said Richard Temple was, and yet is, seised of the said two parts of the said Mannor, and of the Advowson of the Vicaridge of Burton Bassett aforesaid, as appertaining to the said two parts of the said Mannor in his Demesne as of Fee, and right, in the time of the King that now is,

That being so seised the said Vicaridge became void by the said Deprivation of the said Richard Mansell, by reason whereof he the said Richard Temple, being seised of the said Advowson as aforesaid, presented to the said Vicaridge, the said Chamberlain, as was lawful for him, then traverseth absque hoc, That one third Part of the Advowson of the said Vicaridge, namely to present a fit person to the same Vicaridge every third turn of the said Vicaridge doth appertain to the said one third part of the said Mannor, and to the said one third part of the Rectory Improprate of Burton Bassett, as the said John Tufson hath alledg'd, which he is ready to aver, and demands Judgment.

And the said Chamberlaine the Clerk, taking by Protestation, that he doth not know any the matters in the Declaration to be

Ⓒ

true;



true; and taking also by Protestation, that before the said Vicaridge became void by the Deprivation of the said Richard Mansell, and at the time it was so void, the said Richard Temple was, and yet is, seised of the said two parts of the said Mannor, and of the Advowson of the Vicaridge of the said Church of Burton Bassett, as appertaining to the said two parts of the said Mannor in his Demesne, as of Fee and right: And for Plea saith, That he the said Chamberlain is Vicar of the said Vicaridge by the Presentation of the said Richard Temple, and was thereto admitted, instituted and inducted.

Then traverseth absque hoc, That the said Thomas Lord Wootton after the death of the said John Reignalds, so as aforesaid presented to the said Vicaridge, being void in his turn, the said John Cragg, as the said Tufton hath alledg'd, and demands Judgment.

As to the Bishops Plea, his excuse is admitted, and the Plaintiff hath Judgment with a cessat executio against him, and a *Writ* to admit idoneam personam to the Vicaridge non obstante reclamatione.

To the Defendant Temples Plea the Plaintiff demurs, and the Defendant Temple joyns in Demurrer.

To the Plea of Chamberlain the Incumbent the Plaintiff replies, That the said Thomas Lord Wootton after the death of the said John Reignalds Incumbent, as aforesaid, presented to the said Vicaridge then vacant in his turn as aforesaid, the said John Cragg, as the Plaintiff hath formerly alleag'd, Et de hoc petit quod inquiratur per patriam.

To which the Defendant Chamberlain doth not rejoyne any thing, nor joyns in issue, and therefore the Plaintiff hath Judgment to recover his Presentation, as against him, and a *Writ* to the Bishop non obstante reclamatione, and to remove the Defendant Chamberlain from the Vicaridge, notwithstanding his Admission, Institution and Induction, but with a cessat executio until the Plea be determined between the Plaintiff and the Defendant Temple.

**THIS CASE** in fact cannot be put shorter than as it hath been open'd to be upon the Record; It being a history of several Presentations to the Vicaridge of Burton Bassett, and of several supposed Titles, so to present in the persons, who presented.

The Questions therefore in this Case do arise from the causes of the Plaintiffs demurring to the Defendants Plea, which as hath been insisted on, are two.

1: The first is, That in a Quare Impedit Plaintiff and Defendant are both Actors, and either of them, as their right happens to



to fall out, may have a Writ to the Bishop to admit his Clerk,  
That therefore either of them must make out a sufficient Title.

For it will be unreasonable, That a man should have a Writ to the Ordinary to admit his Clerk, who hath made no Title appear to the Court, why it should be granted him.

That the Law is clear, the Plaintiff in a Quare Impedit must in his Count alledge a Presentation in himself, or those from whom he claims, and that therefore the Defendant should likewise so do.

But in this Case the Defendant in his Plea hath alledged no Presentation in any from whom he claims, or in himself.

2. The second cause of Demurrer insisted on, is, That the Defendant hath by his Plea traversed the appendency alledged in the Plaintiffs Count of the third part of the Advowson of the Vicaridge of Burton Bassett to the third part of the Mannor, and third part of the Rectory of Burton Bassett, whereas he ought to have travers'd the Presentation alledged by the Plaintiff in the Lord Wootton, by whom the Plaintiff claims, and not the appendency: And divers Authorities have been pretended, that so is the Law.

1. As to the first cause of Demurrer: It is true, that in a Quare Impedit both Plaintiff and Defendant may be Actors, and either have a Writ to the Bishop, as the right falls out to be.

But it is not true, that both are always Actors in a Quare Impedit: For if the Defendant hath presented his Clerk, and he be admitted, instituted and inducted before the Quare Impedit brought, the Defendant hath then no cause to have a Writ to the Bishop for the doing of that which is already done; and consequently in such Case the Defendant is no Actor but a bare Defendant.

When a man hath presented, and his Clerk is instituted, and inducted, he is at the end of his work, and hath no more to do than to keep what he hath gotten; for thereby he hath a full possession, which is Title sufficient, if there be not a better.

But the Plaintiff, who is to recover that which he hath not, must shew a good Title before he can recover, or he shall never avoid the Defendants possession by shewing no Title, or an insufficient, which is the same with none.

It can be neither Law nor Common Reason for the Plaintiff to tell the Defendant, you have no good Title, and thence to conclude therefore I have.

The Plaintiff must recover if at all by his own strength, and not by the Defendants weakness, as is well urg'd and clear'd in Digbys and Fitzherberts Case in the Lord Hobart.

The Defendant hath alledged in his Plea a Title pro forma, and that he hath presented by reason thereof, and that his Clerk is instituted and inducted, which is sufficient for the present and future time, if no better Title be oppos'd to it, without alledging any other Presentation in himself, or any from whom he claims.

But if the Defendant were out of possession, as the Plaintiff is, he must then make out a good Title, as the Plaintiff now must, or else the Defendant should never have a Writ to the Bishop to admit his Clerk; and in such Case only it holds true, That the Defendant is Actor as well as the Plaintiff.

And in such Case he is to alledge a Seisin of the Advowson, as the Plaintiff must in himself, or those from whom he claims, which can never be done without alledging a former Presentation, that being the only actual Seisin of an Advowson; for the cause, why he should present to the present vacancy.

So as the not alledging a former Presentation will be no objection to the Defendants Title, besides the Plaintiff hath alledg'd a Presentation both in his Ancestor Sir Thomas Temple of Reig-nalds, and in himself of Mansell for him, but I make no account of that, for if the Defendant will take advantage of a Title admitted him by the Plaintiff, he must take it as the Plaintiff gives it, which in this Case the Defendant doth not.

For the Plaintiff by his Count makes the Defendants Ancestor and himself seisd in their Demesne, as of Fee, of 2 Parts of 3 of the Mannor of Burton Bassett, and of a third part of the Advowson of the Vicaridge of Burton Bassett, as appendant to the said 2 Parts.

But the Defendant by his Plea saith he was seised in Fee of 2 Parts of 3 of the said Mannor, and of the intire Advowson of the Vicaridge, as appendant to the same 2 parts, and so presented, which is another Title than that admitted by the Plaintiff.

2. For the 2 cause of Demurrer, which is a point of more difficulty, I take it for Law, and shall accordingly prove it, That when the Defendant traverseth any part of the Plaintiffs Count or Declaration in a Quare Impedit, it ought to be such part, as is both inconsistent with the Defendants Title, and being found against the Plaintiff doth absolutely destroy his Title, for if it doth not so, how-ever inconsistent it be with the Defendants Title, the Traverse is not well taken.

To

To prove this I shall make use of 2 Cases urg'd at the Bar for the Plaintiff: but rightly understood, are fully against him.

The first is 10 H. 7. f. 27. in a Quare Impedit the Plaintiff declared, that he presented such a one his Clerk, who was adpic-<sup>10 H. 7. f. 27.</sup>ted, instituted and inducted, and after the Church became void, and he ought to present, the Defendant pleaded his Ancesto<sup>r</sup> was seiso<sup>n</sup> of a Mannor, to which the Advowson was appendant, and presented, and that the Mannor descended to him, and that the Church being void, he presented and traversed, absque hoc, that the Advowson is in gross.

It was adjudg'd, that the Defendant ought to have traversed the Presentation, and not the Seisin of the Advowson in gross.

Whence it was inferr'd, that in the present Case the Presentation alledg'd ought by like reason to have been traversed, and not the appendency, for traversing the appendency in this Case differs not from traversing the Seisin in gross in that Case.

But the reason of that Judgment, when rightly understood, is very clear.

1. The Plaintiff in the Quare Impedit (as the Case appears in the book) did not declare, that he was seiso<sup>n</sup> of the Advowson in gross, and presented (though perhaps if the Original Declaration did appear, it might be he did so declare) but declares, that he presented, and his Clerk was admitted, instituted and inducted, and the Church becoming void, it belong'd to him to present again.

For which reason, he alledging no Seisin in gross of the Advowson, but only his Presentation, and that his Clerk was received, the Defendant formally ought to have traversed the Presentation, which was alledg'd, and not the Seisin in gross of the Advowson, which was not alledg'd.

But the Case is the same, whether he did, or did not, alledg in his Declaration, that he was seiso<sup>n</sup> of the Advowson in gross and presented.

For still the Plaintiffs Presentation was to be traversed by the Defendant, and not his being seiso<sup>n</sup> in gross, though it were true, that the Defendant, making Title by the appendency of the Advowson to his Mannor, the Plaintiffs Seisin in gross was absolutely inconsistent with the appendency, and therefore speciously to be traversed by the Defendant.

But that traverse left a Title in the Plaintiff not destroyed, and therefore was not good.

For

For whether the Plaintiff were seised or not of the Advowson in gross, he presenting in the vacancy, and his Clerk being admitted, instituted and inducted, he thereby gained a good Title by Usurpation to present, when the Church became next void.

And that is the true reason in that Case, why the presentation which made the Plaintiffs immediate Title to present again, was to be traversed, and not his Seisin in gross of the Advowson, which was not material, when his Usurpation gave him a Title, though he were not seisd in gross before his Usurpation.

Ander. 1 Part  
f. 296. p. 276.

The next Case I shall use is as good authority out of the new Books as the other was out of the old. It is the Lord Buckhursts Case reported in the first part of the L. Anderson.

The L. Buckhurst brought a Quare Impedit against the Bishop of Chichester and T. Bickley for disturbing him to present to the Vicaridge of Westfield, and declared that the Advowson of the Vicaridge appertain'd to the Rectory of Westfield, whereof he was seised in Fee, and presented Maurice Sackvil his Clerk, who was thereto admitted, instituted and inducted, that the Vicaridge was a Vicaridge with Cure of the annual value of 8 l. And that the said Sackvil accepted another Benefice with Cure, by reason whereof, and of the Statute of 21 H. 8. the Vicaridge became void, and he presented and was disturbed by the Defendants.

The Bishop pleaded, that before the said purchase one Richard Bishop of Chichester, his Predecessor, was seised of the Advowson of the said Vicaridge in Fee as in gross, and collated to the said Vicaridge being void, one Maurice Berkley, who was inducted thereto, and the said Richard dying, the present Bishop was made Bishop, and became seised of the Advowson, and the Church became void by the said Sackvil's taking another Benefice with Cure, and he collated the said Bickley the other Defendant, and traversed absque hoc, that the Advowson of the said Vicaridge pertained to the Rectory of Westfield modo & forma, as the Plaintiff alledg'd. And Bickley, the other Defendant, pleaded the same Plea.

Upon these Pleas it was demurred, because the traverse to the Appendancy was not good, as was alledged; and after much Argument, and many Cases cited, where the Appendancy was traversable.

The Court resolved the appendancy was not traversable in the Case, nor was it material, whether the Advowson were appendant



pendant or in gross, as the book is express, so as nothing could be traversable in the Case then, but the Lord Buckhursts Presentation, which after the Induction of his Clerk, though it were by Usurpation made him a good Title to present, when the Vicaridge became next void.

Whence it follows, that if the Defendant could not traverse the L. Buckhursts Presentation of Sackvil, which was his immediate Title, the Defendant was remediless, but by a Writ of Droit d'Advowson.

And in the resolution of this Case of the L. Buckhurst, the Case of 10 H. 7. before cited was principally relied on, as warranting the Judgment which it fully doth, it being adjudged for the same reason there, that the Seisin in Fee of the Advowson in gross was not traversable, but the Presentation was, as it was adjudged in this Case, that the appendency was not traversable by the Defendant, but the Presentation.

And by the way I observe, that in the Report of the Lord Buckhurst's Case it is admitted, that the Plaintiff in the Case of 10 H. 7. did count, that he was seised of the Advowson in gross and presented, whereas I noted the Original Case in the Book is, that he counted only upon his Presentation, and probably it was so for the reasons given in Digbies Case by the Lord Hobart, that a bare Presentment is only militant, when so alledged by the Plaintiff, and may be in such a Case, as may prove the Defendant to have right of presenting at the present avoidance, if no right be alledged by the Plaintiff, why he should present.

Hobart-Digbies Case is 102.

Whence I collect, that in both these cases of 10 H. 7. and this of the L. Buckhursts, though there were a manifest inconsistency in the first Case between the Plaintiffs Count, that he was seised of the Advowson in gross, and presented, and the Defendants Title, that he was seised of a Mannor, to which the Advowson was appendant; for it was impossible it should be appendant for the Defendant, and in gross for the Plaintiff.

And in the L. Buckhursts Case, who counted that he was seised of the Rectory of Westfield, to which the Advowson of the Vicaridge belong'd, and the Defendant made Title, that he was seised of the Advowson in gross, which Titles were directly inconsistent, yet neither the Seisin in gross in the first Case, nor the appendency in the last Case were traversable, but the Presentation of the Plaintiffs in both, which made their immediate Titles to present at the next avoidance, whether there were a Seisin in gross, or an appendency or not, when they first presented.



As in these 2 Cases the true reason of the Law appears, why the Seisin in gross of the Advowson, nor the appendency of the Advowson alledged by the Plaintiffs were not traversable, but only the Presentation.

Hob. Digbies  
Case f. 103.

By these Cases the Lord Hobarts scruple in Digbies Case is satisfied, where he thinks, that if a man hath gained a Title by Usurpation at the next avoidance, he must not declare, that he was seised in Fee, formerly of the Advowson, and presented; but must declare specially of the true Patrons former Presentation, and then the Church becoming void, that himself presented, lest otherwise he declaring, that he was seised of the Advowson in Fee, the Defendant should trice him by traversing his Seisin, which was false, when in truth he had a right to present by Usurpation, for by these Cases it is clear, that the Seisin in gross, nor appendency are traversable, though alledged by the Plaintiff, when he hath gained a Title by Usurpation, but the Presentation ought to be traversed.

I shall for clearing this Learning shew in the next place, when the Seisin in gross, or appendency of the Advowson alledged by any Plaintiff in his Count is traversable by the Defendant, and not the Presentation, and the true reason of the difference.

27 H. 8. f. 29.

In a Quare Impedit, the Plaintiff declared, that I. S. was seised in Fee of a Mannor, to which the Advowson was appendant, and presented, and after infeoffed the Plaintiff of the Mannor, whereby he became seised, until the Defendant disseised him, and during the Disseisin, the Church became void, and the Defendant presented, the Plaintiff entred into the Mannor, and so continued the Advowson, and the Church is again become void, whereby the Plaintiff ought to present.

The Defendant pleads, that a stranger was seised of 4 Acres of Land, to which the Advowson is appendant, and presented and of the four acres infeoffed the Defendant, and the Church being void it belongs to the Defendant to present, and takes a Traverse absque hoc, that he disseised the Plaintiff of the Mannor.

This Traverse was adjudged not good; for the disseisin, or not disseisin of the Mannor was not material to intitle the Plaintiff to the Quare Impedit; but all his Title was by the appendency of the Advowson to the Mannor, and therefore the Traverse ought to have been, and was so resolved to the appendency, which destroyed the Plaintiffs intire Title to present, and also inconsistent with the Defendants appendency of the Advowson to his four acres.

I shall only put one Case more to the same purpose out of the new Books reported by the Lord Hobart.

Sir Henry Gawdy Kt. brought a Quare Impedit against the Arch-Bishop of Canterbury, Sir William Bird, and Humfrey Rone Clerk, and declared that Sir Rich. Southwell was seised of the Mannor of Popenbo in Norfolk, to which the Advowson was appendant and presented, and his Clerk was instituted and inducted, that Southwell bargained and sold the Mannor to one Barow, who being seised, the Church became void by the death of Southwells Incumbent, and so continued for eighteen months, whereby the Queen in default of the Patron, Ordinary and Metropolitan presented by Lapse one Snell, then by mean Conveyances derives the Mannor to which the Advowson is appendant to himself, and that by the death of Snell it belongs to him to present, and is disturbed by the Defendants.

Sir Hen. Gaudy  
dies Case  
Hob. 301.

The Archbishop claims nothing, but as Ordinary, Sede vacante of the Bishop of Norwich.

Sir William pleaded ne disturba pas.

And Rone the present Incumbent pleaded, that he was Parson by the Kings Presentation, and that long before Southwell had any thing in the Mannor Queen Eliz. was seised of the Advowson in gross in right of the Crown, and presented Snell; that the Advowson descended to King James by the death of the Queen; and he being seised, the Church becoming void by Snell's death, presented the present Incumbent, who was instituted and inducted.

And traversed absque hoc, that the Advowson was appendant to the Mannor of Popenbo, and thereupon Issue was joined.

In this Case also the Traverse of the appendency by the Defendant was clearly good, and so admitted, for the Plaintiff Gaudy had no more, nor other Title to present than by the appendency of the Advowson to the Mannor, and the Incumbents death, and the appendency to the Mannor was inconsistent with the Defendants Title by the Advowson's being in gross.

These two last Cases fully prove the Rule by me taken, and which will conclude the Case in question, that the Traverse is well taken to the Appendency of the Advowson, when it is all the Plaintiffs Title to present, and is inconsistent with the Defendants.

But in this Case of Gaudys, the Jury found specially, that Southwell was seised of the Mannor with the Advowson appendant and presented, and that the Incumbent dying 2 Feb. 1588. the Queen the 15th. of Feb. in the same year presented Snell to the Church then void, per mortem naturalem ultimi Incumbentis ibidem

D

vacantem,

vacantem. Et ad nostram Præsentationem jure prærogativæ Coronæ nostræ Angliæ spectantem, and her Clerk instituted by Letters of Institution, running per Dominam Reginam veram & indubitatam, ut dicitur, patronam.

And after the death of Snell, King James presented Rone in these words, ad nostram præsentationem, five ex pleno jure, five per lapsum temporis, five alio quocunque modo spectantem: and referred to the Court, whether the Advowson were appendant to the Mannor or not; It was adjudged.

1. That the Advowson remained appendant notwithstanding the Queens Presentation.

2. That her Presentation could not be by Lapse, for her Presentation and Institution and Induction were in the same month of Febr. wherein the voidance was.

3. If the Queen had presented by Lapse it had made no severance of the Advowson.

4. That the Queens Presentation made no Usurpation, because she presented, as supposing she had a Title in right of her Crown, as appeared by the form of her Presentation, which is very remarkable, and therefore her Presentation was meerly void; for it shall not be intended, the Queen took away anothers right against her own will and declared intention.

5. For the same reason King James his Presentation of Rone, who by the form of his Presentation supposed he had a good Title, when he had none, was also void: and this agrees with the Resolution in Greens C. the 6th. Rep. that the Queens Presentation made as by Lapse, when she had no such Title to present by lapse, but another Title either in right of her Crown, or by Simony, or some other way, was void, because she was mistaken in her presentation: So if she presents by reason of some supposed Title in her Letters of presentation, when indeed she had no Title at all, the Presentation is meerly void, and though such Presentation make a plenarty, so as to avoid Lapse, yet the right Patron is not out of possession, but may present 7 years after, and if his Clerk be inducted, the former presentee is immediately outed.

Hence it is to be noted as a point very observable in this Learning, that though the King may present by Usurpation, yet he shall never present by Usurpation if in the Letters of Presentation, he present by some Title which he hath not; but if he present generally, making no Title at all by his Presentation, and his Clerk be received, and dyes, he hath gained a Title by Usurpation.

But if the King declare in a Quare Impedit, that he was selected

sed of the Advowson in gross, or as appendant to a Mannor and presented, if he had presented before by Usurpation, the Defendant shall not traverse his Seisin of the Advowson or appendency at all.

So is it in the Case of a Common Person also, as appears in the end of the Case, 10 H. 7. where it is said, It was agreed by the Court, that if the Plaintiff entitle himself to an Advowson, as appendant to a Mannor, and sheweth a presentment, as appendant (for so are the words) and the Defendant shews another Presentment, without that that the Advowson is appendant, this Traverse is good, for if it be not appendant, as the Plaintiff declares, it is sufficient to destroy his Declaration; and so there both are traversable, but otherwise, as the Case is here, viz. the principal Case first cited.

I conceive the meaning clearly to be that in the principal case, the Seisin in gross of the Advowson alledged in the Declaration was not traversable, but the presentation, which might be by Usurpation, and made a good Title, though the Plaintiff were not seised in gross of the Advowson.

But if the Plaintiff declare the Advowson to be appendant to a Mannor, and withal sets forth in his Declaration the Letters of Presentation to the Church as appendant, there the Defendant may traverse either the appendency or the Presentation; for though the Advowson were appendant, yet if the Plaintiff presented not, he had no Title.

Whence I infer, that if the Plaintiff had only counted a Seisin of the Mannor, to which the Advowson was appendant without shewing the presentment to be to the Church by vertue of the appendency; the traverse of the appendency had not been good, but it must have been of the Presentation, which might have been by Usurpation, notwithstanding the alledging barely of the appendency, as is resolved before in the point in the Lord Buckhursts Case in Andersens, and in the principal Case of 10 H. 7.

But when the Count is of the appendency of the Advowson, and also of the Presentation to it as appendant there; there could be no Usurpation according to the Resolutions in Sir Henry Gaudies Case in the Lord Hobart before cited, and in Greens Case in the 6th Report of the Lord Cook.

And the not observing of this difference made the Reporter at the end of the L. Buckhursts Case deny this latter part of the Case in 10 H. 7. because it was clearly against the reason of the principal Case in 10 H. 7. and against the Resolution of the L. Buckhursts Case, if the words of shewing the presentment to



have been as appendant had been omitted in the Case.

But those words make the latter Case in 10 H. 7. exactly to agree with the Judgments both in Sir Henry Gaudies Case in Hob. and Greens Case in the 6th. Rep.

15 H. 6. Fitzh.  
 Quare Imped.  
 num. 77.

To the 4 first Cases may be added the Case of 15. H. 6. where the Plaintiff counts in a Quare Impedit, that his Ancestor was seised of a Mannor, to which the Advowson is appendant, and presented and dyed, and that the Mannor descended to the Plaintiff, and the Church became void, whereby he ought to present: the Defendant pleads, that long after the Presentation alledged by the Plaintiff, the Defendant was seised of the Advowson in Fee, and presented such a one, and after the Church became void, and he presented the present Incumbent, and this Plea was allowed a good plea by the Court, without answering to the appendency alledged by the Plaintiff, which was in effect avoided by the Defendants Presentation after: And in this Case the Plaintiff was without remedy, unless he could traverse the Presentation alledged by the Defendant, otherwise than by his Title of Droit d'Advowson.

Crook 2. Car.  
 L. 61. Sir Greg.  
 Fenner vers.  
 Nicholson &  
 Pasfield.

As also the Case in Crook. If the Plaintiff make Title to present, as being seised of an Advowson in gross, or as appendant, and the Defendant make Title, as presented by reason of a Simoniacal presentation made by the Plaintiff, and thereby a Devolution to present to the King, under whom the Defendant claims, because the Defendant doth admit the Advowson to be in gross or appendant in the plaintiff, and that neither of them is inconsistent with the Title, made by the Defendant, he shall not traverse the Seisin in gross, nor the appendency; but because somewhat else is necessary to give the plaintiff right to present, that is the vacancy of the Church, either by death or resignation or deprivation, which the plaintiff must alledge, and which are inconsistent with the Defendants Title, who claims not by vacancy, by death, resignation or deprivation, but by the Simony; therefore he shall traverse the vacancy alledged either by death, resignation or deprivation, as the Case falls out, without one of which the plaintiff makes no Title, and if the present vacancy be by either of them, the Defendant hath no Title.

Now to apply these Cases to the question before us, whether the Defendant should have traversed the Presentation of the Lord Wootton alledged by the plaintiff, or the appendency (which he hath done) to the third Part of the Mannor, and third Part of the Rectory of Burton Bassett. It seems clear, That in all Cases of Quare Impedits, the Defendant may safely traverse the Presentation

on



on alledged in the Plaintiffs Count, if the matter of fact will admit him so to do: for the Plaintiff hath no Title without alledging a Presentation in himself, his Ancestor, or those from whom he claims the Advowson; but the Defendant must not traverse (that is deny) the Presentation alledged, when there was a Presentation, for then the issue must be found against him.

The Lord Wootton therefore having presented, by what right soever it was, there was no traversing his Presentation.

But by what right soever the Lord Wootton presented the Plaintiff hath no right to present, unless the Lord Woottons Presentation were by the appendency to the third part of the mannor, for he deriving no title to the Advowson as in gross, nor any other way, but as belonging to the third part of the Mannor, which he derives from the Lord Wootton: Therefore nothing is traversable by the Defendant but the appendency, which, if found against the Plaintiff, he hath no colour of Title.

*Pass.*

*Pasc. 19. Car. 2. Rot. 484. C.B.*

*Henry Edes Plaintiff in a Quare Impedit against Walter Bishop of Oxford.*

**T**hat he was, and is, seised of the Advowson of the Church of Chymer in gross, in Fee, and thereto presented Will. Paul his Clerk, who was instituted and inducted accordingly, That after the Church becoming void, and so remaining by the death of the said William Paul, and it belongs to him to present, he is hindered by the Defendant.

The said Bishop by Protestation, saying the Church did not become void by death of the said William Paul, pleads that the said Church was full of the said Paul.

The said W. Paul was created Bishop of Oxford, whereby the said Church became void, and the right of presentation devolved to the King by Prerogative.

25 H.8.c.21.

Then pleads the clause of the Act of 25 H.8. which impowrs the Archbishop of Canterbury to give faculties and dispensations as the Pope did at large.

That after and before the Writ purchased Decimo of the King the said William Paul dyed at Oxford.

That after his death, the Defendant was elected Bishop of Oxford, and after and before the Writ purchased, viz. the 27. of November 1665. Gilbert now Archbishop of Canterbury and Primate of all England by his Letters of Dispensation according to the said Act, and directed to the said Walter, the Defendant, now Bishop, under his Seal then elect, and upon the Bishops petition of the means of his Bishoprick.

Graciously dispensed with him together with his Bishoprick, the Rectory of Whitney in the Diocess and County of Oxford, which he then enjoyed; and the Rectory of Chymer aforesaid, which he by the Kings favour hoped shortly to have, to receive, hold, retain and possess in Commendam, as long as he lived and continued Bishop of Oxford, with, or without Institution and Induction, or other solemnity Canonical, and to take and receive the profits to his own use without Residence. Quantum in eodem Archiepiscopo fuit, & jura regni paterentur.

The

The Letters of Dispensation not to be effectual without the Kings Confirmation.

That the King after the 28 of Novemb. 17. of his Reign under the great Seal to the said Church, so void by Cession, presented the Defendant, then as aforesaid, Bishop Elect, and after, that is, the 28. of Novemb. 17. Car. 2. the King by his Letters Patents under the great Seal, dated the same day and year, and duly enrolled in the Chancery according to 25 H. 8. did confirm the Letters of Dispensation, and that the said Bishop might enjoy all things contained in them according to the form and effect thereof with clauses of non obstante aliquo Statuto, or other matter.

Then avers, that the cause of Dispensation was not contrary to the word of God, and that the Pope in H. 8. time did use to grant the like Dispensations to the Kings Subjects, which he is ready to averr, &c.

The Plaintiff replies, That true it is William Paul Prædict. was elected Bishop of Oxford, being Incumbent of Chymer, but that after his election, and before his creation, he 2 Decemb. 1663. obtained Letters of the Archbishop under his seal of Faculties for causes therein mentioned of Dispensation to hold the Church of Brightwell, and the Rectory of Chymer, both which he then lawfully had, and to retain the same with his Bishoprick, after his consecration, &c. durant. vita sua natural. & Incumbentia sua in Episcopatu prædict. & quamdiu eidem Episcopatu præset.

The King 9. Decemb. 15. of his reign confirmed the Letters Patents under the great Seal with non obstante according to the Ordinary form.

30. Decemb. 15. Car. 2. was created Bishop.

Upon this Replication the Defendant demurs, and the Plaintiff joyns in Demurrer.

Note the Defendant doth not shew to whom he was presented.

He doth not say, that he enter'd by vertue of the Presentation of the King in Chymer.

In discussing the Case, as it appears, upon this Record, I take it granted.

1. If a person Incumbent of one or more Benefices with Cure be consecrated Bishop, all his benefices are ipso facto void.

2. Upon such voidance the King, and not the Patron is to present to the benefices so void by Cession.

3. That

3. That any Dispensation after the Consecration comes too late to prevent the Voidance.

4. That the Pope could formerly, and the Arch-bishop now, can sufficiently dispense for a Plurality by 25 H. 8.

I shall therefore first make one general Question upon the Case as it appears.

Whither *William Paul*, Rector of *Chymer*, and elected Bishop of *Oxford*, and before his Consecration dispensed with by the Arch-bishop to retain his said Rectory with the Bishoprick, and having the said Letters of Dispensation confirmed by the King, and inroll'd *Modo & forma prout* by the Record, did not by virtue of the said Dispensation and Confirmation prevent the voidance of his said Rectory by Cession upon his Consecration?

For if he did, the Rectory became not void until his death, and by his death the Plaintiff being Patron, hath right to present.

To determine the General Question, I shall make these Questions, as arising out of it.

1. Whether any Dispensation, as this Case is, be effectual to prevent an avoidance after Consecration?

2. Whether the Archbishop hath power, with the King's Confirmation, to grant such a Dispensation?

3. Whether this Dispensation in particular be sufficient to prevent a voidance of *Chymer* after Consecration of the late *William Paul*.

1. This Case differs from the Bishop of *Ossory's* Case in *Sir J. Davies's* Reports, who had a faculty accipere in Commendam with odd power, and executed it by collating himself into a Living void by Lapse.

2. It varies from the Case of *Colt and Glover* in the Lord *Hobarts* Reports, and the Dispensation there to the Bishop elect of *Lichfield and Coventry*, which was to retain one Benefice which he had; and propria autoritate capere & appendere as many as he could, under a certain value.

The defects of that Dispensation are numerous, and excellently handled by the Lord *Hobart* in that Case of *Colt and Glover*. But in our Case there is no affinity with the defects of those Dispensations, but is barely to retain what legally was had before.

Obj. 1.

Per *Thyrning*.  
The Bp. of *St. David's* Case.  
11 H. 4. f. 37. b.  
38. a.  
Rolls f. 358.  
ob. 1. 11 H. 4. f.  
60. B. per *Hill*.

An Incumbent of a Church with cure being consecrated Bishop, his Living was void by the Law of the Land; therefore the Pope could not prevent the voidance after consecration, for then the Pope could change the Law of the Land, and if the Pope could not, the Archbishop cannot.

The



The better opinion of that Book 11 H. 4. is contrary, and Answ. 1.  
so agreed to be in the Irish Case of Commendams, and Rolls his  
opinion is grounded only upon 11 H. 4.

If an Incumbent with cure take another Benefice with cure,  
the first is void by the Law of the Land, and the Patron hath right  
to present; therefore the Pope could not grant a Dispensation,  
nor the Arch-bishop now can, to hold a Plurality, for that were  
to alter the Law of the Land, and to prejudice the Patron. But  
the Law was and is otherwise, therefore that reason concludes  
not in the case of a Bishop.

A second reason in that case of 11 H. 4. is, that such a Dispensation. Obj. 2.  
on cannot prevent the avoidance, because there is no use of it 11 H. 4. f. 59. bi  
until Consecration; for before the Incumbent retains his Living per Skreen.  
without any Dispensation, and when consecrated, his Benefices  
are void, and then it is too late to dispense as is agreed.

This reason is as effectual against a Dispensation for a Plura- Answ. 2:  
lity, for before a man takes a second Living, there can be no use  
of it, and after by this reason it comes too late, for the Patron  
hath right to present.

It was in that great Case endeavoured to avoid the pressure  
of this Argument by saying the Dispensations in cases of plura-  
lity were not alike with that of retaining the former Benefice,  
when the Incumbent was created Bishop, because in the case  
of Plurality there was no actual avoidance, and consequently no  
title to the Patron to present before Deprivation, and that the Di-  
spensation prevented the Deprivation, which was a Spiritual Act,  
wherewith the Patron had not to do, and by a Consequent only  
prevented the avoidance.

It is resolv'd in Holland's Case, Digby's Case, and many o-  
thers, that the Patron may present as soon as the Incumbent is  
Instituted in a second Living without deprivation, and that the  
Law was anciently so, therefore that evasion is not material. Hollands  
Case. 4. Rep.  
Digby's Case.  
4. Rep.

Another answer hath been likewise offered, and passeth in the  
New Books for current, that in the case of Pluralities the  
avoidance is by the Canon Law, and therefore may be dispensed  
with by the same Law, but in the case of a Bishop made, the  
avoidance is by the Common Law.

If Canon Law be made part of the Law of this Land, then is  
it as much the Law of the Land, and as well, and by the same  
Authority, as any other part of the Law of the Land. And if  
it be not made the Law of the Land, then hath it no more effect  
than a Law of Utopia, therefore the Canon Law in force here is  
Law of the Land.



Besides their meaning is to be learn'd, who say, an Incumbent Benefice, made a Bishop, is void by the Common Law, and not by the Canon Law. The words of Thyrning in that case 11 H. 4. are, (who was then Chief Justice.)

11 H. 4. f. 60. b.  
Da. Rep. f. 81.  
a. & f. 68. b.

I suppose that when a man Benefic'd is made a Bishop, it is by the Law of holy Church that his Benefice becomes void, and the same Law which gives the voidance may cause that it shall not be void, and that concerns the power of the Apostle. The Common Law doth not prohibit Pluralities, nor make a voidance of his Benefice when the Incumbent is Bishop, but the ancient Ecclesiastical Law of England.

Obj. 3.  
11 H. 4. f. 77. a.  
per Hill.

It is a Contradiction that the Incumbent being the Bishops Subject, and the Bishop his Sovereign, should be united: the Servant, qua Servant, may as well be Master, the Tenant, qua Tenant Lord, the Deputy the Deputor, the Delegator the Delegated, which is impossible.

Ans.

It is a Contradiction that a person Subject, being so should not be Subject, but no contradiction that a person Subject should cease to be so; the subjection of the Incumbent ceaseth when the Rectory is in the Bishop; the Deputy is not when the principal Officer executes the office in person, and relation of Lord and Tenant destroy'd, when the Lord occupies the Land himself.

If an Act of Parliament should enable every Bishop to hold his former Benefices, no contradiction would follow, nor doth now by the Dispensation.

And note, all these Reasons deny the Popes power formerly, the Arch-bishops now, and the King's also; for they are not Reasons against the power of the party dispensing, but that the Subject matter is capable of no dispensation.

There is no Inconsistence for a Bishop to be an Incumbent, for he is a Spiritual Corporation, and being Patron of a Living, might and may have it appropriate, that is, to be for him and his Successors perpetual Incumbents.

Da. Rep. f. 80.  
b.

The Rectories of *Eastmeane* and *Hambleton* are appropriate *ad Mensam* of the Bishop of *Winchester*, and many others in *England* and *Ireland* so appropriated.

Selden. Hist.  
of Titular. 6.  
par. 3. f. 8. b.  
c. 9. par. 2. f.  
253.

Every Bishop, many hundreds of years after Christ, was universal Incumbent of his Diocese, received all the profits which were but Offerings of Devotion; out of which he paid the Salaries of such as officiated under him, as Deacons or Curates in places appointed.

Second Question, Whether the Pope formerly used to dispense in such a case, and consequently the Arch-bishop now can by the Stat. of 25 H. 8. c. 21?

Quest. 2.

1. The particular dispensation granted to the Bishop of St. Davies in 11 H. 4. is a full instance, nor was it in the Argument of that case insisted, that the Pope could not dispense with a Bishop to retain or receive a Benefice. But the sole Question was, Whether (in that particular case, because the Benefice to be retain'd belong'd to the presentation of a Church-man, viz. the Bishop of Salisbury) the Dispensation did not amount to a provision, and so was within the Statute of Provisions, 25 E. 3.

Bishop of St. Davies Case.

2. By the Statute of 28 H. 8. it appears the Bishop of Rome did grant Faculties and Dispensations to the King's Subjects, as Pluralities, Unions, Tryalties, Appropriations, Commendams, Exemptions; where Commendams are enumerated: and by that Act all granted by the Pope are made void, but to be renew'd in the Chancery.

28 H. 8. c. 16.

3. Procuring Commendams were so frequent in Ireland, that a special Act of Parliament was there made 7 E. 4. against all such as should purchase Bulls for any Commendam, to put them out of the Kings protection.

7 E. 4. c. 3.

4. A Bastard instituted and inducted before Deprivation, a secular Priest before he became regular, whereof many were in England (and Thyrning saith he knew that Edmond Monk of Berry, who was with Edward the Third, held many Benefices though a Monk) and Pluralities were ordinarily dispensed with by the Pope.

11 H. 4. f. 78. a. & f. 6. a.

11 H. 4. f. 76. b.

5. Hankford saith he hath seen that the same man was Abbot of Glastenbury, and Bishop of another Church simul & semel.

11 H. 4. f. 38. a.

Horton, The Pope may grant that one man may hold three Bishopricks at a time, which Hankford agreed, if with consent of the Patrons: For if without their consent, it was not dispensing to hold them, but granting away the property of the Patrons, which a Dispensation could not.

11 H. 4. f. 76. a.

Henry Beaufort, Uncle to Henry the Sixth, had a Dispensation to retain the Bishoprick of Winchester, being Cardinal, but it was ineffectual, because obtained after he was Cardinal.

Da. Rep. f. 80. 77. b.

Cardinal Woolsey obtained before he was Cardinal a Dispensation to hold the Arch-bishoprick of York, and the Abbey of St. Albans, together with his Cardinalship.

Lindwood. Titulo de Præbendis cap. Audistis, Potestas quæ secundum antiqua jura dabatur Episcopis ad dispensandum super

Lindwood. f. 100. b.

pluralitate Beneficiorum restricta est, saltem in dignitatibus & Beneficiis curatis, sed circa beneficia simplicia bene poterunt Episcopi dispensare. And in the same Gloss, In dignitatibus & curatis solus Papa dispensat.

Authority in the point that a Rector of a Church dispens'd with according to 25 H. 8. before he is consecrated Bishop, remains Rector, as before, after Consecration.

98 H. 6. f. 19.  
Br. Spoliati-  
on. pl. 4.

1. Where the Pope licenses one who is created a Bishop to retain his ancient Benefice, and the Patron presents another, the elder Incumbent sues a Spoliation in the Spiritual Court, it well lyes, for both claim by the same Patron, Quæ supradicta omnes concesserunt, saith the Book.

Fitz. N. B. Tit.  
Spoliation f.  
36. b.

2. The Writ of Spoliation lyes properly by one Incumbent against another Incumbent, where the right of the Patron comes not in debate.

As if a person be created Bishop, and hath a Dispensation to hold his Rectory, and after the Patron presents another Incumbent, who is instituted and inducted, the Bishop shall have against that Incumbent a Spoliation, this proves the Bishop to continue Incumbent after his Consecration, and to hold his Rectory by his former presentation.

Dy. 6. El. f.  
228. b. pl. 48.  
6 & 7 El. f.  
233. A. p. 12.

John Packhurst, Rector of Cleve in Gloucestershire, had a Dispensation to hold it notwithstanding he were advanc'd to any Bishoprick in the Realm, for three years from the Feast of St. Michael, 1560. to the same Feast 1563. he was after consecrated Bishop of Norwich, and within the three years resign'd: the Queen presented one her Chaplain, supposing she had title by Cession of the Bishop; Sir H. Sydney the Patron brought a Quare Impedit, and the Church was found to be void by Resignation of the Bishop of Norwich, and recover'd and had Judgment.

1. This case proves the Bishop of Norwich Incumbent, as formerly, notwithstanding his Consecration, else the Living had not voided by his Resignation.

2. The Dispensation was only for three years, yet he was as intire Incumbent, and might resign during those three years, as if he had not been Bishop.

3. It proves the Dispensation may be for a time only to hold his former Benefice, & ad modum concedentis, which clears the last Question, that in such a Commendam retinere the Dispensation is good, though it be but for as long as he is Bishop of that See, and then determines.

An

An Incumbent made Bishop, and retaining by Dispensation, may have (which none but a perfect Incumbent can have) a Writ of

Spoliation,  
Juris Utrum,  
Vi Laica Removenda,  
Annuity for him, or  
Annuity brought against him.

In the Bishop of Ossory's case, they which argued against him conclude, out of all this difference results, viz. That a Faculty granted to one which is not Incumbent to take a void Benefice is void, and a Faculty to one which is Incumbent of a Benefice to retain the same is good. The other side for the Bishop concluded the Capere in Commendam good where the Patron was not prejudic'd, as in Lapse, and consequently the Retinere to be good, consented to by him who was to present upon voidance.

The Commendam Retinere may be for years, or any time, the difference is manifest if their nature and reason be observed. Colt and Glovers Case, Hobart. f. 156.

The difference between Retinere and Capere is no less than between holding that which is already my own, and taking that which is anothers. I am already benefic'd by Presentation, &c. in ordinary form, I would take a Bishoprick which would void the Benefice, therefore I obtain a Dispensation to continue holding my Benefice for three years, I remain Parson of the same benefice of no less estate than I had before; and when the three years are past the benefice voids, as it would have done at the first, if there had been no Dispensation.

And again, a Bishop by Dispensation may retain as many Benefices as he had lawfully before, but take none of new if he had his number before, &c. Hob. f. 158.

William Bradbridge being Bishop of Exeter, obtain'd Letters of Dispensation from the Arch-bishop, with the Queens Confirmation to receive any two Benefices with or without cure, and retain them with his Bishoprick within his Diocese, quamdiu Episcopatu præfict. præfict after he was presented to the Rectory of Newton ferris, and dyed, and the Patron presented Simoniacally, and after six Months the Bishop presented as by Lapse, and a Quare Impedit brought against him, where the avoidance of the Church per mortem of the Bishop of Exeter is admitted, though it be taken by protestation in that case that the Church non vacavit per mortem. Cok. lib. Intr. f. 475. Heales Case. Rolls 344. b. pl. 2.

Note, the Bishop of Exeter was presented to the Arch-bishop, and instituted and inducted.



If after the death of the last Bishop, who held this Church by Dispensation, the King may present, as the case is, the next succeeding Bishop to hold it by Dispensation, he may so present the third, and so toties quoties there shall be a Bishop of Oxford, and for the same reason, viz. the small Incomes of the Bishoprick.

So shall the Patron for ever loose his Presentation, omitting nothing to be done, nor committing any thing not to be done, but doing his duty in presenting a fit person, and who deserved to be made Bishop.

#### Objections.

Tr. 9 E. 3. pl. 6  
18 E. 3. f. 21.  
Fitz. N. Br. f.  
34. Letter F. The most specious Objection is made upon the Books of 9 E. 3. & 18 E. 3. and the Abbot of Thorneys case there cited; That if the King recover in a Quare Impedit, and after confirms the Incumbents estate, yet after the Incumbents death, the King shall present, and therefore in this case.

**Ans. 1.** When the King hath recover'd in a Quare Impedit, he hath right to present uncontrollably by the Record, and may at his pleasure sue forth Execution, and in the mean time permit the Incumbent to continue in the Benefice at his pleasure: but here it is denied that the King hath any right to present.

**Ans. 2.** The Kings permission or grant, that the Incumbent should not be troubled during his life, cannot be pleaded by the Patron in barr of the Kings right to present by vertue of his Judgment, for the Kings permission was nothing to the Patron; and the King ought to have Execution of his Judgment when he demands it against him.

11 H. 4. f. 76. b  
per Thyrning.  
45 E. 3. f. 19. **Ans. 3.** Justice Thyrning also gives the Reason of those Books, The Cause, saith he, is although the King confirms the Incumbents estate, yet he had not his estate or possession by the King, but by his Patrons presentment, and by the Kings confirmation his right was neither executed nor extinct.

**Ans. 4.** The Kings confirmation in the present case is not of the nature of his confirmation in the case of 9 E. 3. for he doth not here as there he did, intend to transfer any right of his into the Incumbent, by continuing his possession: But his confirmation here is only formal, and to compleat the Dispensation of the Arch-bishop, which is not sufficient by the Rule of the Act of 25. unless confirmed by the King: It was otherwise in the Popes case before the Act.

There



There are many Presidents in Mr. Noy's Book, where in like case, the King, after the death of a Bishop, holding in Commendam, after his translation to another See, and after his resignation, hath presented. Obj. 2.

All those Presidents are since the Twentieth of the Queen, which cannot alter the Law. Answ. 1. 2. Who knows in the cases of death, whether those Presentations were not by consent of the Patrons, and doubtless there are Presidents wherein the Patrons did present, else this Question had been earlier. But *Judicandum est legibus non exemplis.*

Upon Translation of a Bishop holding a Commendam in the Retinere, as long as he continued Bishop there, the King ought to present, for the Dispensation is determined upon his remove, and then is as if it had not been, and a Dispensation gives no property to the Living, nor takes away any. Answ. 2.

But where property is given to the Living, as by Presentation, Institution, and Induction, or by Grant, as in Appropriations, and sometimes otherwise by the King, such presenting or granting for a year or six, is to grant it during life. As an Attornment can not be for a time, nor a Confirmation, nor a Denization or Naturalization, and the like, but such Acts are perfect, as they may be, notwithstanding Restriction to time, as is agreed well in Manwaring's Case. Hob. Colts and Glovers Case.  
Manwaring's Case. 21 Jac. Crook. f. 691.

I shall say nothing of the case of Resignation, as not being in the present Question.

Judgment was given by the Opinion of the whole Court, That the Avoidance was by Death, not by Cession.

Hill.

*Hill. 19 & 20 Car. II. C. B. Rot. 1785.*

*Baruck Tustian Tristram* Plaintiff, *Anne Roper* Vicountess *Baltinglafs* Vidua, Defendant, in a Plea of Trespafs and Ejectment.

**T**he Plaintiff declares, That the Defendant, vi & Armis, entred into 20 Messuages, 1000 Acres of Land, 200 Acres of Meadow, and 500 Acres of Pasture, cum pertinentiis in Thornbury, Shalston, Evershaw, Oldwick, Westbury, and Looffield, and into the Rectory of Thornbury, which Thomas Gower Esq. and Baronet, and George Hilliard to the said Baruck demis'd the First of Octob. 19 Car. 2. Habendum from the Feast of St. Michael the Arch-angel last past, for the term of Five years next ensuing, into which he the said Baruck the same day entred, and was ousted and ejected by the Defendant ad damnum 40 l.

To this the Defendant pleads Not Guilty.

And the Jury have found specially, That the Defendant is not guilty in all those Tenements, besides 5 Messuages, 400 Acres of Land, 50 Acres of Meadow, 100 Acres of Pasture, cum pertinentiis in Thornbury, Shalston, Evershaw, Oldwick, and Westbury, and in the Rectory of Thornbury, and besides in one Messuage, 100 Acres of Land, 50 Acres of Meadow, and 100 Acres of Pasture cum pertinentiis in Looffield.

And as to the Trespafs and Ejectment aforesaid in the said five Messuages, &c. and in the Rectory of Thornbury, the Jury say upon their Oath, that befoze the said Trespafs and Ejectment suppos'd 22 Junii, 12 Jac. Sir Arthur Throgmorton Esq. was seisd in Fee of the aforesaid Rectory and Tenements last mentioned, and of the said Premises in Looffield, and so seisd.

A certain Indenture Tripartite was made 22 Junii, 12 Jac. between him the said Sir Arthur of the first part, Edward Lord Wootton, Augustine Nicholls Esq. Francis Harvey Esq; and Rowly Ward Esq; of the second part, and Sir Peter Temple, and Anne Throgmorton, Daughter of the said Sir Arthur, of the third part.

To this effect, That the said Sir *Arthur Throgmorton* did covenant and promise with the said Lord *Wootton* and Sir *Augustine Nicholls*, in consideration of Marriage to be had between the said Sir *Peter Temple* and the said *Anne*, and other the considerations mentioned in the said Indenture by Fine or Fines, before the Feast of St. *Michael* the Arch-angel next ensuing, or other good Conveyance to be levied by him and the said Dame *Anne* his wife, to the said Lord *Wootton*, &c. The scite and precinct of the Priory of *Loosfield*, the Rectory of *Thornbury*, and divers Mannors, Lands, and Tenements in the said Indenture mentioned, several yearly Rents therein mentioned; and all other his Lands in the Counties of *Northampton*, *Buckingham*, and *Oxford*, at any time belonging to the said Priory, to convey and assure

To the use of himself, for life, without Impachment of Waste.

Then to the use of Dame *Anne* his Wife.

Then to the use of the said Sir *Peter Temple*, and the said *Anne* his Wife, during their natural lives, and the longer Liver of them: and after both their Deceases,

To the use of the first Son of the Body of *Anne* by the said Sir *Peter* begotten; and of the Heirs Males of the Body of the said first Son, so to the sixth Son.

Then to the use of all other Sons in succession, in like manner, of the Body of *Anne*, begotten by the said Sir *Peter*.

And for default of such Heirs, To the use of all the Issues Female of the Body of the said *Anne* by the said Sir *Peter* begotten; and the Heirs of the Bodies of the said Issues Female.

For default thereof, To the first Son of the said *Anne* by any other Husband, and his Heirs Males, and so to the tenth.

In like manner to the Issues Female of the Body of *Anne*, with divers Remainders over,

A Proviso, That it be lawful for Sir *Arthur*, at all times during his life, to lett, set, and demise, all or any the said Premises aforesaid, which at any time heretofore have been usually letten or demised to any person or persons, for and during the term of One and twenty years or under, in possession, and not in Reversion; or for or during any other number of years determinable upon one, two, or three Lives in Possession, and not in Reversion, reserving the Rents therefore now yielded or paid, or more to be yearly due and payable during such Lease and Leases, unto such person and persons unto whom the said Premises, so to be demised, shall come, and be by virtue of these Presents, if no such demise had been made, so long as the same Lessees, their Executors and Assigns, shall duly pay the Rents, and perform their Conditions according to the true meaning

of their Indentures of Lease, and commit no waste of and in the things to them demised.

The like *Proviso* verbatim for Sir Peter Temple, and Anne his Wife, to make like Leases during their Lives, and the Life of the longer liver of them, after the death of Sir Arthur, and Dame Anne his Wife.

That a Fine was accordingly levied, &c. to the uses aforesaid.

They find that all the Messuages, Lands, Tenements, and Rectory in the Declaration mentioned, are compris'd in the said Indenture Tripartite

They find the death of Sir Arthur Throgmorton and Anne his Wife, 2. Septemb. 1 Car. 1. and that Sir Peter Temple entered, and was seisd for term of his life.

They find he had Issue of the Body of Anne his Wife, Anne the now Defendant, Daughter and Heir of the Bodies of the said Sir Peter and Anne his Wife; and that Anne, Wife of Sir Peter, died 2. Sept. 3 Car. 1.

1. They find a Demise by Sir Peter Temple to Sir Thomas Gower and Hillyard of the Rectory of Thornbury, 9. Maii, 23 Car. 1. for 30 l. Rent.

2. They find a Demise by him to them of a Messuage in Thornbury, 9. March, 23 Car. 1. of Woolheads Tenement, for 16 l. 13 s. 4 d. Rent.

3. They find a Demise to them, 9. March, 23 Car. 1. of Land in Thornbury, held by Roger Rogers, Rent 13 l. 6 s. 8 d.

4. They find a Demise, 9. March, 23 Car. 1. of Nelson's Tenement in Thornbury, Rent 16 l. 13 s. 4 d. at Michaelmas and Lady-day.

5. They find a Demise, 13. March, 23 Car. 1. of Lands in Shalfston, Everham, and Oldwick, held formerly by William Hughes, Rent 15 s. 4 d.

These respective Leases were made for the term of 90 Years, determinable upon the Lives of the Lady Basinglasi the Defendant, Sir Richard Temple's, and the Life of a younger Son of Sir Peter Temple, as long as the Lessees should duly pay the Rents reserved, and commit no waste, according to the Limitation of the *Proviso* in 12 Jac. which is recited in the respective Leases.

6. Then the Jury find, quod predicti separales redditus super predictis separabilibus Indenturis, Dimissionis reservat. fuerint reservat. redditus de & super premissis predictis, 22. dii Junii, Anno Jacobi Regis 12. supradicti. Et quod predicti, separales redditus, &c. in forma



ma prædict. reservat. ad Festum Sancti Michaelis Arch-angeli, quod fuit 1653. debit. non solut. sive oblat. fuerint super idem Festum, sed quod iidem redditus infra unum mensem prox. post Festum prædictum præfat. *Anna Roper* Defend. solut. fuerunt.

7. They find a Demise to them of the Scire and Priory of Looffield, 9. March, 23 Car. 1. at the Rent of 100 l. payable equally on Lady-day and Michaelmas-day (demised by Sir Arthur Throgmorton, and Anne his Wife, 20th. of May, 12 Eliz. 1570. to William Hewer for 21 years, Rent 100 l. Lady-day and Michaelmas with some Exceptions) for the like term of 90 years, and upon like Limitations as in the former Leases.

The Jury find quod Tenementa prædicta cum pertinentiis in *Looffield* supranominat. tempore dict. *Eliz.* nuper Reginae Angl. fuerint dimissa ad redditum 100 l. pro termino 21. Annorum, sed dimissio & terminus 21 Annorum expirati fuerunt; Et dicunt quod eisdem Juratoribus non constabat, quod dicta Tenementa in *Looffield* prædict. 22 die Junii, 12 Jac. aut per spatium 20 Annorum tunc antea fuerint dimissa; Et dicunt ulterius quod 50 l. pro dimidio unius Anni de prædictis Tenementis in *Looffield*, ad Festum Sancti Michaelis Arch-angeli quod fuit Anno Dom. 1653. debit. oblatae fuerint; Et quod prædicta *Anna Roper* ante Festum Annunciationis prox. sequent. intravit.

They find, that Gower and Hillyard claiming the said 5 Messuages, 400 Acres of Land, 50 Acres of Meadow, and 100 Acres of Pasture in Thornbury, Shalfston, Evershaw, Oldwick, and Westbury; As also the said Messuage and other the Premises in *Looffield*, and the Rectory of Thornbury, before the supposed Trespass and Ejectment, entred upon the Possession of the Lady Baltinglass, and so possessed, made a Lease to the Plaintiff, by virtue of which he entred, and was possessed, until outed by the Defendant, as by the Declaration. But whether the Defendant be culpable, they refer to the Court.

Upon this Verdict the Questions are two:

1. The first, Whether the Defendants entry into the six Tenements leased to Gower and Hillyard, for not payment of the Rent reserv'd upon the day of payment, were lawful or not?

And as to that the Court is of opinion, that the Defendants Entry was lawful; for that the Leases were not deriv'd out of the Estate of Sir Peter Temple, who was but Tenant for life, and had no Reversion in him, but out of the Estate of Sir Arthur



Lind. f. 235. a.

Throgmorton, by Limitation of the Proviso in the Deed, 12 Jac. so as the Leases were not Leases upon Condition to pay the Rent at the day, to which any Demand or Re-entry was requisite for Non-payment; but were Leases by Limitation, and determined absolutely according to the Limitation. For this, Littleton is express, that the words *quamdiu*, *dum*, and *dummodo*, are words of Limitation. As if a Lease be made to a Woman, *dum sola fuerit*, or *dum casta vixerit*, or *dummodo solverit talem redditum*, or *quamdiu solverit talem redditum*; so are many other words there mentioned: And if there be not a performance according to the Limitation, it determines the Lease.

But it is otherwise where a Rent is reserv'd upon Condition; for there is a Contract between the Lessor and Lessee, and the Law evens the Agreement between them, as is most agreeable to Reason, and the supposition of their Intention.

But in the present case Sir Peter Temple had no interest in him, out of which such Leases could be deriv'd, but had a power only to make them by virtue of the Proviso in Sir Arthur Throgmorton's Deed, and the Lessees must be subject to such Limitations as are thereby made.

It was agreed by the Council of the Plaintiff, That it was not a Condition for payment of the Rent, nor could it be; but they would call it a Caution. A Condition to determine a Lease or a Limitation, is a Caution, and a material one; but such a Caution as hath no more effect than if it were not at all, is a thing insignificant in Law; and therefore must not supplant that, which in proper terms is a Limitation, and hath an effect.

2. The next Question is upon the Lease of Looffield, which arises upon the words of the Proviso, That it should be lawful for Sir Peter Temple to demise all or any the Premises, which at any time heretofore have been usually letten or demised for the term of 21 years or under, reserving the Rent thereupon now yielded or paid.

And the Jury finding the Lands in Looffield to have been demised 12th. of the Queen for 21 years for 100 l. Rent, and that that term was expired, and not finding them demis'd by the space of twenty years before at the time of the Indenture, 12 Jac. Whether the Lease by Sir Peter Temple of them, be warranted by the Proviso (there being reserv'd the Rent, reserv'd by the Lease in 12 Eliz. viz. 100 l.

The Court is of opinion, that the Lease of Looffield is not warranted by that Proviso, for these Reasons.

1. It is clear, Sir Arthur Throgmorton intended to exclude some Lands from being demisable by that Proviso, namely, such as at any time before were not usually let and set to Farm: For where a mans power is limited to lease Lands so specially qualified; that is, let and set usually at any time before, when he could not lease at all, without such special power given him, he is absolutely barr'd from leasing Land which is not so qualified.

2. It must be presumed Sir Arthur Throgmorton knew he had such Lands, as according to his Intention were not at any time before usually set and let, and had reason not to suffer them to be demisable within that Proviso, to the prejudice of those in Reversion. As for example, his Mansion-house, Gardens, Curtilages, and Lands occupied in Demesne.

For it had been vain to provide against the leasing of Land in such manner condition'd, whereof he had none so condition'd. But if notwithstanding, it shall be taken that any his Lands, which at any time past, how long soever since, one, two, or three hundred years, were demised, as perhaps the site of his House and all his Demesne were, though he knew not of it, shall therefore now be demisable within this Proviso.

Then is the Proviso inconsistent with it self, and repugnant to his meaning; for he intended thereby to hinder the demising of some of his Lands: But by that construction of the Proviso, every part of his Land might be demised; for doubtless, at some time or other, every part of it was demised, and probably by Records or other ancient Evidence, might appear so to be.

3. If this were the meaning of the Proviso, the word (usually) in it was to no purpose; for it had been much clearer to say, That any Lands, at any time heretofore demis'd, should be demisable for 21 years by Sir Peter Temple, which doubtless was not Sir Arthur's meaning, and consequently this Lease of Looffield not according to his meaning.

1. Now for the literal sense of the Proviso: If power be to make Leases for 3 lives, or 21 years, of Lands usually letten; Land which hath been twice letten is within the Proviso, but not Land which hath been but once letten.

Therefore this Land of Looffield letten but once, 12 Eliz. is not within the Proviso.

But

Rolls, Title  
Power. 3261.  
n. 11. 2 Jac. 10  
Banco.

But I insist not much upon this case, for the words usually demis'd may be taken in two senses: The one for the often farming or repeated Acts of leasing Lands, to which sense this Case doth reasonably extend.

But the other sense of Land usually demis'd, is for the common continuance of Land in lease, for that is usually demis'd; and so Land leas'd for 500 years long since, is Land usually demis'd, that is, in lease, though it have not been more than once demis'd, which is the more receiv'd sense of the words, Land usually demis'd.

2. The meaning of the words, at any time, is various, and of contrary meaning. If it be asked by way of Question, Were you at any time at York? It is the same as, Were you ever, or sometime at York? So in the Question, Was this Land at any time in Lease? is the same, as, Was it ever, or some time in Lease?

But when the words, at any time, are not part of a Question, but of an Answer, they have a different and contrary meaning. As if it be asked, Where may I see or speak with John Stiles? and it be answered, You may speak with him, or see him at any time at his House. There the words, at any time, signify at all times, and not as in the question, at some time.

So when the words are used by way of a plain enunciation, and not as part of a Question or Answer; As, You shall be welcome to my House at any time, signify You shall be welcome at all times.

So in the present Case, if it be made a Question, Was such Land heretofore at any time usually letten and set to Farm? imports in the Question, Was this Land ever, or at some time heretofore (how long ago soever) usually let to Farm.

But by way of enunciation if it be said, This Land was usually let to Farm at any time heretofore; it means, This Land was commonly, at all times heretofore, let to Farm.

So this Land was usually in Pasture at any time heretofore, signifies, this Land was always, or commonly in Pasture heretofore.

So, you may lease any Land heretofore letten to Farm at any time, usually, is the same with heretofore letten to Farm commonly at all times. And this Construction of the Proviso agrees both with the words and intention of Sir Arthur.

But what was not farmed at the time of this Proviso made, nor 20 years before, could not be said to be at any time before commonly farmed; for those 20 years was a time before, in which it was not farmed.

But

But to come closer, The Proviso is that Leases may be made for 21 years of any the Lands in the Deed, reserving the Rents thereupon reserved at the time of the Deed made, viz. 12 Jac.

Which necessarily implies, that the Land demisable by that Proviso, must be Land which then was under Rent; for where no Rent then was, the Rent then thereupon reserv'd could not be reserv'd. But Loofield had then no Rent upon it, for it was not let of 20 years before, nor then, and therefore was not demisable by that Proviso.

The words (or more) will not at all help the Plaintiff; for the words (more or less) are words of relation; the one of addition to what was before; the other of diminution; for (more or less) must relate to something positive in the kind before, and can never be a relation to nothing.

So (more wages) necessarily implies some before, (more meat) (more drink) (more company) and, in all expressions (more) denotes a relation to somewhat before of the kind; and in the present Case, reserving (more Rent) must imply some before reserved. And therefore where none was at the time of the Deed made 12 Jac. there cannot, in any congruity of speech, more be reserved, or intended to be reserved.

Quare, If the Record be mended in the point of finding the death of Sir Peter Temple, and when he died.

In this the Chief Justice delivered the Resolution of the whole Court.

*FIN.*



Hill. 21 & 22 Car. II. Rot. 2259. C. B.

Hartf. ff. *Ralph Dixon* Plaintiff, versus *Dean Harrison* Defendant;  
In a Replevin, Quare cepit Averia ipsius *Radulphi*, &  
ea detinuit contra vadios & plegios, &c.

Distress, 21  
Maii, 21 Car.  
2.

**T**he Plaintiff declares, That the Defendant, 21 die Maii, 21 Regis nunc, at Sandridge, in a place called Fregmorsfield, took three Cows of the Plaintiffs, and detain'd them against Pledges quousque, to his damage 40 l.

The Defendant, as Bailiff of Elizabeth Rooper, Widow, Samuel Hilderham Gent. and Mary his Wife, Michael Biddulph Esq; and Frances his Wife, Humphrey Holden Esq; and Theodosia his Wife, avows and justifies the Caption; for that the place in quo, &c. contains a Rood of Land cum pertinentiis in Sandridge aforesaid.

That long before the Caption, Ralph Rowlett Knight, was seisd of the Mannor of Sandridge in the said County, whereof the said place is and was parcel time out of mind.

Grant of the  
Rent, June 26  
8 Eliz.

That the said Sir Ralph, 26. June, 8 Eliz. at Sandridge aforesaid, by his Deed in writing under his Seal, produc'd in Court, thereby granted and confirmed to *Henry Goodeare* then Esquire, and after Knight, and to the Heirs of his Body, a yearly Rent of 30 l. out of all his said Mannor, and other his Lands in Sandridge aforesaid, payable at the Feasts of St. Michael the Arch-angel, and the Annunciation.

The first payment at such of the said Feasts which should happen after the expiration, surrender, or forfeiture to be made after Sir *Ralph Rowlett's* death, of certain terms of years, of parcel of the Premises made to one *William Sherwood* and *Ralph Dean* severally.

With Clause of Entry and Distress to *Henry*, and the Heirs of his Body, if the Rent were unpaid.

And that Sir Ralph gave the said *Henry* seisin of the said Rent, by payment of a penny, as appears by the Deed.

Rowletts  
death, 1 Sept.  
33 Eliz.

Sir Ralph Rowlett, after the First day of September, 33 Eliz. at Sandridge aforesaid, died.

That



That after the Second day of September, 33 Eliz. the said terms of years expired, whereby the said Henry became seisd of the said Rent in tail.

Terms expired Sept. 2. 33 Eliz.

That Henry had Issue the said Elizabeth and Mary, and one Anne, his Daughters and Coheirs, and died 1. Octob. 33 Eliz. so seisd.

Hen. Good-year died 1. Octob. 33 Eliz.

That the said Coheirs, being seisd of the said Rent, to them and the Heirs of their Bodies, the First of May, 1634. Mary married the said Samuel Hildersham, and Anne married one John Kingston, whereby the said Elizabeth and Samuel and Mary, in right of the said Mary, and John and Anne in right of Anne, were seisd of the Rent.

Mary married Samuel 1. May 1634. and Anne the same time married John Kingston.

December 25. 1635. Anne had Issue by John her Husband, the said Frances and Theodosia; and John her Husband and Anne died 1. Januarii, 1635.

Anne had Issue Frances and Theodosia, she and her Husband John died 1 Jan. 1635.

That thereby Elizabeth, Samuel, and Mary, in right of Mary, Frances, and Theodosia became seisd of the Rent.

April the 10th. 1647. Frances married the said Biddulph, and Theodosia the said Humphrey Holden, whereby Elizabeth, Samuel and Mary, in right of Mary; Biddulph and Frances, in right of Frances; and Holden and Theodosia in right of Theodosia, became seisd of the Rent.

And for 120 l. for four years arrears after the death of John and Anne, ending at the Feast of St. Michael, 1655. being unpaid at the time and place, &c. the Defendant, as their Bailiff, entered, and distrained the said Cows.

The Plaintiff demands Oyer of the Deed of Grant, and hath it in these words, &c.

And then the Plaintiff replies, that before the time of the Caption, that is, A die Pasche in quindecim dies, a Fine was levied in the Court of Common Pleas, in the One and twentieth of the King, before the Justices there, &c. between Richard Harrison Esquire, and the Avowants of the said Rent, with Warranty to the said Richard and his Heirs.

And that this Fine was to the use of the Conizors and their Heirs, and demands Judgment.

The Defendant thereupon demurs.

WHERE the Law is known, and clear, though it be unequitable and inconvenient, the Judges must determine as the Law is, without regarding the unequitable or inconvenience.

Those defects, if they happen in the Law, can only be remedied by Parliament; therefore we find many Statutes repealed, and Laws abrogated by Parliament, as inconvenient, which before such repeal or abrogation, were in the Courts of Law to be strictly observed.

But where the Law is doubtful, and not clear, the Judges ought to interpret the Law to be as is most consonant to equity, and least inconvenient.

And for this reason, Littleton in many of his Cases, resolves the Law not to be that way which is inconvenient, which Sir Edward Cook, in his Comment upon him, often observes; and cites the places, See A. 87.

In the present Case there are several Coparceners, whereof some have Husbands leig'd of a Rent Charge in tail: the Rent is behind, and they all levy a Fine of the Rent to the use of them and their Heirs.

If after the Fine levied, they are barr'd from distraining for the Rent arrear, before the Fine, is the Question? It being agreed they can have no other remedy, because the Rent is in the reality, and still continuing.

If they cannot distrain, the Consequents are,

1. That there is a manifest duty to them of a Rent, for which the Law gives no remedy, which makes in such case the having of right to a thing, and having none, not to differ: for where there is no right, no relief by Law can be expected; and here, where there is right, the relief is as little, which is as great an absurdity as is possible.

2. It was neither the Intention of the Conizors, to remit this Arrear of Rent to the Tenant, nor the Tenants to expect it: nor could the Conizors remit it but by their words or intentions, or both; nor did they do it by either.

3. It is both equitable in it self, and of publick convenience, that the Law should assist men to recover their due, when detain'd from them.

4. Men in time of Contagion, of Dearth, of War, may be occasioned to settle their Estates when they cannot reasonably expect payment of Rents from their Tenants for Lives, or others, and consequently not seasonably distrain them; and it would be a general inconvenience in such case to lose all their Rents in Arrear. So as both in Equity and Conveniency the Law should be with the Avowants.

In

In the next place we must examine, Whether the Avowants, that is, the Conizors of the Fine, be clearly barr'd by Law to distrain for the Rent arreare before the Fine? For it must be agreed, they have no other remedy by the Common Law, or otherwise: to which purpose I shall open some Premises, that my Conclusion may be better apprehended.

1. A privy is necessary by the Common Law to distrain and avow between the Distrainor and the Distrained, that the Tenant may know to whom the Rent or other Duty ought to be paid; and likewise know a lawful distress from a tortious taking of his Cattel.

2. This privy is created by Attornment, either in Fact or in Law, by the Tenant to the Lord, to the Reversioner, to the Grantee of a Remainder, or of a Rent by Deed or by Fine: For this Sir Edward Coke upon the 579th. Section of Littleton, and in many other of his Sections. Lit. Sect. 579.

The Conizee of a Fine before Attornment cannot distrain, because an Avowry is in lieu of an Action, and thereto privy is requisite; for the same cause he cannot have an Action of Waste, nor many other Actions there mentioned, and the Authorities cited; and so is Littleton himself expressly, Section Lit. Sect. 580.  
580.

Where a man by grant to himself, or by descent from his Ancestors, hath a Rent charge, and might once lawfully distrain, and Avow for such Rent if Arrear, by due Attornment made to him or his Ancestors, he may still do so whenever the Rent is behind; unless by Law that power be some way lost.

1. That power may be lost by extinguishment of the Rent, by a perpetual union of the tenancy to the rent, or rent to the tenancy, or in other manner, the Grantee having no Heir.

2. It may be lost for a time by Suspension, as by such union for a time, and after restored again.

3. It may be lost by a Grant of the Rent upon Condition, and upon performance or breach of the Condition restored again; but the power of distraining is not in this Case lost by any of these ways. 7 H. 6. 3. Br. Extinguishment, p. 17.

4. It may be principally lost by a sufficient granting over, and transferring the Rent to another; which way comes nearest to the Case in question.

Andrew Og-  
nell's Case,  
4 Rep. 149.

And therefore I shall agree the Case so much insisted on, which is said to be agreed per Curiam, in Andrew Ognell's Case, in the fourth Rep. That if a man be seized of a Rent-service, or Rent-charge in Fee, and grant it over by his Deed to another and his Heirs, and the Tenant Attorn, such Grantor is without remedy for the Rent arrear before his Grant; for distrain he cannot, and other remedy he hath not, because all privity between him and the Tenant is destroyed by the Attornment to the Grantee, and he hath no more right than any Stranger to come upon the Land, after such transferring over of the Rent.

I shall likewise agree another Case, That if such Grantee should regrant the same Rent back to the Grantor, either in fee, in tail, or for life, and the Tenant Attorn, as he must to this regrant, yet the first Grantor shall never be enabled to distrain for Arrears due to him before he granted over the Rent; for now the privity between him and the Tenant begins but from the Attornment to the regrant, the former being absolutely destroyed, and the Tenant no more distrainable for the ancient Arrears than he was upon the creation of the Rent, for Arrears incurred before, till first attorn'd.

If the Case in question prove to be the same in effect with either of these Cases, then the reason of Law for these Cases must sway and determine the Case in question.

And I conceive that there is no likeness or parity between the Case in question, and either of those Cases, either for the fact of the Cases, or the reason of Law.

I shall therefore begin with comparing this Case with the first of those Cases.

1. In the first of those Cases, he that is seisd of the Rent-charge, doth intend to transferr his Estate in the Rent to the Grantee, and it is accordingly actually transferr'd by the Tenants Attornment to the Grant.

2. The Grantee by his Grant and Attornment to it, becomes actually seisd of the Rent, and may enjoy the benefit of it by perception of the Rent.

3. His Wife becomes dowable of it.

4. It is subject to Statutes, Recognizances, and Debts enter'd into by the Grantee, or due from him to the King.

5. It is possible to descend to his Heir.

6. It may be Arrear, and he hath a possibility to distrain and avow for it.

1. But



1. But in the Case in question, the Conizors of the Fine did never intend to transfer their Estate in the Rent to the Conizee, nor that any Attornment be made to him: What a man intends to pass to another, he intends to be without it himself, at least for some time, which is not in this Case.

2. The Conizee never becomes actually seiz'd of the Rent, and not only doth not, but never can enjoy the perception of it; for there is no moment of time wherein the Conizors themselves are not actually in seisin of it, and consequently may distrain if it be in Arrear, and the Conizee can never have actually seisin, or possibility to have Attornment or distrain, his seisin being but a meer fiction, and an invented form of Conveyance only.

3. The Conizee's Wife is never dowable of it.

4. It is not subject to any Statutes, Recognizances, or Debts of the Conizee.

5. It is never possible to descend to his Heir, for it instantly vests in the Conizors.

6. It can never be Arrear to the Conizee, nor hath he ever a possibility to distrain for it.

To this purpose what is agreed in the Lord Cromwell's Case, 2. Rep. is applicable; Then it is to be consider'd what seisin Perkins had, who was the Conizee of a Fine in that Case; and he had but a Seisin for an instant, and only to this purpose, to make a Render; for his Wife shall not be endow'd, nor the Land subject to his Statutes or Recognizances, f. 77. L. Cromwell's Case, 2. Rep. f. 77.

Therefore that first Case cited out of the Report of Andrew Ognell's Case, which I admit to be good Law, hath no resemblance with the present Case, in any circumstance or consequent; but had the Fine been to a third persons use, the consequents had been the same as in the Case cited out of Ognell's Case, not as to the Conizee, but as to that third person to whom the rent was intended.

To conclude then this first part;

1. That whereof the Conizors were alwaies actually and separately seiz'd, the same was never by them transferr'd to the seisin of another: But of this Rent the Conizors were alwaies in actual seisin; for there was no moment of time wherein they were not seiz'd; therefore this Rent was never transferr'd to the seisin of another, nor could any other, for any moment of time, have a separated seisin thereof; for what was mine at all times, could be anothers at no time.

2. It



Dyer 28 H. 8.  
f. 12. a. p. 51.

2. It is an impossibility in Law, that two men severally shall have several Rights and Fee-simples in possession in one and the same Land, simul & semel per Fitz-herbert, in the Argument of Bokenhams Case; and the same impossibility is so to have of a Rent. For hath this relation to the learning of Infants in Digbie's Case, Coke 1. Rep. and Fitz-williams in the sixth Report.

That an old Use may be revoked, and a new rais'd in the same time, and an old possession ended, and a new begun; this is usual in all transmutation of Estates and things also: For in nature, a new form introduc'd, doth in the same moment destroy the old, according to that, Generatio unius est corruptio alterius; but a separate possession can never be in two at the same time not out of the one, and yet in the other, more than the same Body can be in two several places at the same time.

Dyer 28 H. 8.  
f. 12. 6. per  
Baldwin  
Chief Justice.

3. If a Feoffee to use of me and my Heirs, make a Feoffment to another without consideration to the use of me and my Heirs, notwithstanding there is a new Feoffment, the words of a use to me and my Heirs, yet the use being the former use, viz. to me and my Heirs, this latter is no new use given to me, for I cannot have that use given which I had before; for to give what I had before is no gift, as is well press'd by that Book.

And by the same necessity, where I have the possession before, a new possession cannot be really given me by the Statute of 27 H. 8. whose operation is properly to give to him which had not the possession, but only an use; the possession which he wanted before to the use which he had before, in such manner as he hath the use.

L. Cromwells  
c. 2. Rep.

But here the Statute cannot give the possession to the Conizors which they never wanted, nor the Conizee never had, ad aliquem Juris effectum, though perhaps fictitiously, and in order only to a form of Conveyance, which was not the end or intention of the Statute of Uses; but an use invented after that might be made of the Statute, in order to a general form of Conveyance, by which the parties might execute their Intentions, wherein the Conizee is but an Instrument or Property to execute their purpose, as in Cromwells Case is said; but the Statute brings the new uses rais'd out of a feign'd possession, and for no time, in the Conizee to the real possession, and for all times in the Conizors, which operates according to their intent to change their Estate, but not their possession.

Besides

Besides, it hath been admitted at the Bar, that if the Fine had been levied without consideration, and no uses express'd, the Conizors might then have distrained for the Arrear, because the uses were the same as before, which, if granted, it resolves the Question, for the Attornment and power to distrain follows the possession, and not the use: And if after the supposed possession of the Conisee, and his being leis'd to the old uses, when the Statute gives the possession back to the old uses, the Conizors might distrain for the Arrears before the Fine, as well as for those after, what hinders their distraining for them still? For the possession which the Statute gives to the old uses, is as new a possession as that it gives to the new uses, and the pivity is the same in both Cases in regard of the Tenant.

And it is common experience, that a Fine levied without consideration of use express'd, is to the use of the Conizor and his Heirs, who may have an action of waste after the Fine, for waste committed before, as well as he could before the Fine. The instant possession of the Conisee notwithstanding which, differs not from this Case.

Sir Moyle  
Finch's Case,  
4th Rep. 68.  
b.

The next enquiry is, What affinity this Case hath with the second Case propos'd, viz. That if one seiz'd of a Rent in Fee, grants it over to a Stranger and his Heirs, and the Tenant attorns; if such Grantor regrants the Rent back to the Grantor and his Heirs, there must be a new Attornment of the Tenant to the Regrant; for the pivity by the first Attornment was totally destroyed, and all Arrears of Rent lost when the Tenant attorn'd to the Grantor, which Case I take to be clear Law, for by the Regrant a total new Estate is gain'd in the Rent, and thereby he who hath the Rent as if he never had any former Estate in it.

And in the present Case, the Estates after the Fine are wholly new, and other Estates in the Conizors (to which the Tenant never attorn'd) than the Conizors had before the Fine in these Respects:

1. Before the Fine, the Husbands had but Estates in right of their Wives, and now they are Jointenants with their Wives.
2. The Wives, before the Fine had Estates of Inheritance absolute, and now they are Jointenants with their Husbands, and among themselves where Survivorship obtains.
3. The Women were Coparceners before, and the Husbands in right of their Wives, and they are now all Jointenants.

4. Two of the Coparceners had the Inheritance of entire third parts, and the two other of one intire third part; and now the four Women and three Husbands are equally Jointenants, which are Estates much differing from the Estates they had before the Fine.

I must agree, That where persons seiz'd of a Rent-charge, by granting it over with Attornment of the Tenant, have totally departed from their Estate, and after retake, either such an Estate as they had before, or a differing Estate in the Rent, they must have a new Attornment, and the former privity is wholly destroyed, and consequently no Arrears can be distrain'd for, by reason of the first privity which is not.

But in this Case the Conizors never were, for any moment of time, out of possession of their first Estate, nor destroyed the first privity by any new Attornment, which either was, or possibly could be; but only some have enlarg'd their Estate, some diminish'd it, others alter'd it, without destroying the old privity, which may stand well with the Rules of Law; and consequently they may distrain for Rent arrears, and abow lawfully by reason of the first privity still continuing.

And I must observe in this Cases, that the Avowants, after the Fine, are the same persons avowing as before. 2. That after the Fine, there is but one common Avowry as before. 3. That there is no new person after the Fine, between whom and the Tenant there was not a privity before the Fine.

That a mans Estate in a Rent-charge, may be enlarg'd, diminish'd, or otherwise alter'd, and no new Attornment or privity requisite to such alteration of Estate.

*Litt. Sect. 549.* A man seiz'd of a Rent-service or Rent-charge in Fee, grants the Rent to another for life, and the Tenant attorns after the Grantor confirms the Estate of the Grantee in Fee-tail, or Fee-simple, this Confirmation is good, to enlarge his Estate according to the words of the Confirmation.

Here no new Attornment to this new Estate, which now is Fee-tail or Fee-simple, in the Rent which was before, but an Estate for life is requisite, else the Confirmation were not good; but by Littleton it is good to enlarge the Estate.

2. Sir Edward Cook in his Comment upon this Case, saith, It is to be observ'd, that to the grant of the Estate for life, *Littleton* doth put an Attornment, because it is requisite; but to the Confirmation to enlarge the Grantees Estate, there is none necessary, and therefore he puts none. No

No man can doubt in this Case, that if Rent had been in Arrear to the Grantee for life, when his Estate was enlarg'd, needing no new Attornment or privity, he did not thereby lose the Rent-arrear.

If two Jointenants in Fee let the Land for life, reserving a Rent to them and their Heirs, if one release to the other and his Heirs, this Release is good; and he to whom it was made shall have the Rent of Tenant for life only, and a Writ of Waste without Attornment to such Release, for the privity which once was between the Tenant for life and them in the Reversion. Litt. Sect. 574

So is it if one Jointenant confirms the Land to the other and his Heirs. Litt. Sect. 523.

The Law must necessarily be the same, if a man seiz'd of a Rent-service or Rent-charge in Fee, grant it to two and their Heirs, or to two and the Heirs of one of them, and the Tenant attorn; if after, one Jointenant release to the other, or he which hath the Inheritance to him which hath but an Estate for life, and to his Heirs; the person to whom such Release is made, shall thereby have a Fee-simple, whereas before he had but for life in the Rent, and an Estate absolute, which before was joint, without any new Attornment, for the reason of the former Case, because there was once a privity between the Tenant and them, which was never destroyed.

So is it if there be Lessee for life, the Remainder for life, he, in the Reversion releaseth to him in the Remainder, and to his Heirs, all his right; he in the Remainder hath thereby a Fee, and shall have a Writ of Waste, and likewise the Rent of Tenant for life, if any were, without any Attornment of the Tenant for life, for the former privity between them. Litt. Sect. 579

## Enlargement of Estate by descent.

If a man seiz'd of a Rent-charge in Fee, grant it for life to A. and the Tenant attorns; after the Grantor grants the Reversion of this Rent to the Father of A. and his Heirs, to whom A. attorns (as in this Case he may by Sir Edward Coke's Comment) and after the Father dies, and this Reversion descends upon A. whereby he hath a Fee-simple in the Rent, no new Attornment is requisite for this enlargement of Estate. Coke's Litt. Sect. 556.



## Diminishing of Eſtate.

2. Rep. Sir  
Rowland  
Mayward's  
Caſe.

A man ſeiſ'd of a Rent-charge in Fee, grants this Rent for Seven years, to commence from the time of his death, the Remainder in Fee, and the Tenant attorns in the life time of the Grantor, as he muſt by the Reſolution in Sir Rowland Hayward's Caſe, 2. Rep. here the Grantor hath diminiſh't his Eſtate in the Rent, from a Fee-ſimple to an Eſtate for life; yet it cannot be doubted but he may diſtrain for his Rent-arrear.

And ſo is the Law, where a man ſeiſ'd in Fee of a Rent, for good conſideration Covenants to ſtand ſeiſ'd for life, with Remainder over.

Upon theſe grounds upon Littleton, If a man ſeiſ'd of a Rent-charge in Fee, grant it over to a Feme ſole for a term of years, the Tenant attorns, and ſhe take Husband; and during the term the Grantor confirm the Rent to the Husband and Wiſe for their lives, or in Fee; they become Jointenants for life, or in Fee of this Rent, and need no new Attornment: This Caſe is proved by a Caſe in Littleton, Sect.

Hence it is manifeſt, that where a man hath a Rent for which he may once lawfully diſtrain by Attornment of the Tenant (which gives ſufficient privity to abow) ſuch Grantee or Poſſeſſor of the Rent may enlarge, or change his Eſtate in the Rent to a greater or leſſer, or different Eſtate, and needs no new Attornment or privity; therefore to diſtrain and abow for ſuch Rent whenever Arrear, unleſs he become diſpoſſeſ'd of the Rent and the privity, to diſtrain and abow thereby, be deſtroyed by a Right gained by ſome other to have the Rent, and a Right in the Tenant to pay it to ſome other.

9 H. 6. f. 43.  
Br. Avoury.  
p. 123.

To this purpoſe there is a Caſe, If a man be ſeiſ'd of Land in Jure uxoris, in Fee, and leaſeth the Land for years, reſerving Rent, his Wiſe dies without having had any Iſſue by him, whereby he is no Tenant by the Curteſie, but his Eſtate is determined; yet he may abow for the Rent before the Heir hath made his actual Entry. This Caſe is not adjudg'd, but it is much the better Opinion of the Book.

## Objections.

The Conizors are in possession since the Fine of another *Obj. 1.*  
Estate than they were before the Fine, that is, according to the  
uses of the Fine, which they could not be without an Alienati-  
on of the Rent to the Conizee by the Fine, to enable the raising  
of that new use out of the Estate transferr'd to the Conizee by  
the Fine.

That by such Alienation the former privity between the Co-  
nizors and the Tenant, which they had as Parceners by Ac-  
tornment to the first grant of the Rent, was destroy'd; and  
therefore they cannot now distrain but for Rent-arrear, since the  
Fine, by the possession given them by the Statute of 27 H. 8. to  
which no Attornment is necessary, and not for any Arrears due  
before upon the old privity.

As specious as this Reason seems, it may be answer'd, That *Answer*  
the Conizors had always an actual and separate seisin, and pos-  
session of the Rent, and were at no time without it; therefore  
the Conizee could have no several and separate possession of it  
at any time; for it is not possible that two severally can possess  
the same thing, simul & semel, for the same thing can no more  
be in two separate possessions at the same time civilly, then  
the same thing can be in two separate places at the same time  
naturally.

Is not the Reason then of equal force, that the Conizors  
were at no time out of possession and seisin of this Rent, and  
consequently never lost the power to distrain for it.

As to say the Conizee had sometime a separate possession of the  
Rent from the Conizors, out of which the new uses were raised,  
and therefore the privity to distrain for the old Arrears was for  
sometime destroy'd.

Besides, if the old privity be destroy'd, the greatest absur-  
dity imaginable in Law follows, That a man hath a right to a  
thing for which the Law gives him no remedy; which is in truth  
as great an absurdity, as to say, the having of right, in law, and  
having no right, are in effect the same.

When as on the other side, the loss of the Arrears, and the  
Conizors right to them, is a Consequent deduc'd from the de-  
struction of the old privity between the Conizors and the Tenant  
by an imaginary, and not a real possession of the Rent by the  
Conizee.

Obj. 2.  
Ognell's Case  
4. Rep.

Now will it serve to say, as is insinuated in Ognell's Case, that the Conizors have dispens'd with their own right in the Arrears, and therefore such Arrears in strictness of Law, when the Fine is levied, are not due at all, but remitted, and so no absurdity to have no remedy for a thing not due.

1. By this reason a Law should be equally good that provides no remedy for performance of Contracts, as that which doth; because all Contracts, for performance of which the Law gives no remedy, shall in Judgment of Law be dispens'd with, releas'd, discharg'd.

2. By this reason a Rent-lease, before leisu had of it, shall be no duty, because the Law gives no Remedy before leisin: And consequently such Rent or such Arrears, as in the present Case being paid by the Tenant, may be recover'd again, as the proper money of the Tenant, deliver'd to the Grantee of the Rent without any consideration, upon an indebitatus Assumpsit, the Law creating a promise.

So might a Debt paid after six years elaps'd, for which, by the Statute of Limitations, there was no remedy, yet that doth not cease to be a Debt, as if it had been released.

By like reason, if a man hath by accident had his Bonds burn'd or destroy'd, whereby he had no remedy to recover the Debt by Law, it should cease to be a Debt at all.

32 H. 8. c. 37.

To this the words of the Statute of 32 H. 8. c. 37. may be added, which gives remedy for recovery of such Debts by Executors as were due to the Testators, and for which there was no remedy before, viz. That the Tenants did retain in their hands such Arrearages of Rents, whereby the Executors could not therewith pay the Debts, and perform the will of the Testator, &c. and surely no Arrearages could be of Rent, if they were remitted in Law; nor was it fit the Executors should pay the Debts, or perform the Testators Will with that which was no part of the Testators Estate, either in possession, or as a credit.

7 H. 8. c. 4.

If a common Recovery had been to uses of Lordships and Mannors before the Statute of 27. the Recoverors had no remedy to make the Tenants attorn (for a quid Juris clamat would not lye upon a Recovery) before the Statute of 7 H. 8. c. 4. which did give remedy, and which saith, That such refusal of Attornment was to the great offence of their Conscience refusing, and not only to the disinheritor of the Recoverors, but often to the breaking of the last Wills of the Recoverees, and also to the disinheritor of Husbands, Wives, and others to whose use the Recovery was had. By which it is plain, that duties for which there

there is no remedy often in Law, are not therefore dispenced with, and discharged by the party, as is superficially said in Ognell's Case.

That the Conizee of a Rent granted by Fine to uses cannot have any actual seisin, or be in possession of such Rent, since the Statute of 27 H. 8. cap. 10.

Before the Statute of 27 H. 8. If a Feoffment had been to uses and no Livery given, or given by one Attorney when it ought to have been by two, the uses in such Deed of Feoffment could never rise; so if a Reversion had been granted to uses, and no Attornment to the Grantee, no use could rise, because there was no sufficient Estate in possession. And when the Statute of Uses came, it could have no operation when the Estates in possession were not sufficient.

So if an Estate for life had been granted to the use of a man and his heirs, an Estate in Fee could not rise out of it by the Statute of 27 H. 8. c. 10.

And if before the Statute, a Reversion had been granted by Fine to Uses, and no quid Juris clamor brought, though the Land pass'd by the Fine, yet the Tenant could not be distrain'd, nor a Writ of Waste brought against him until he attorn'd; and when the Statute came to transfer the use into the possession, it could be but into such a possession as the Conizee had by the Fine, without power to distrain, or bring Waste, for the words of the Statute are,

That the Estate, Title, Right and Possession that was in such person or persons, that were, or hereafter shall be seisd of any Lands or Hereditaments, to the use, confidence, or trust of any person or persons, be from henceforth adjudged to be in him or them that have, or hereafter shall have such use, confidence, or trust, &c.

And therefore if before the Statute of 27. a Fine had been levied of a Rent-charge to uses, as this Case is, if before Attornment to, or seisin had by the Conizee, the Statute had come and brought the possession of the Rent to the use, the Cestuy que use could have had the Rent but as a Rent-seck, for which he could not distrain for want of Attornment, nor have an Assise for want of seisin, for the Conizee had no other possession of the Rent; but after Attornment and seisin to or by Cestuy que use, his possession perhaps became perfect.

But



Sir Moyl  
Finch's Caſe,  
Coke 6.f.68.a

But ſince the Statute, if a Fine be levied of a Reverſion of Lands to uſes, or of a Rent, becauſe the uſe and poſſeſſion by the Statute come inſtantly together, and the Conizee of the Fine hath no time poſſible to bring, either a quid Juris clamat, or a quem redditum reddit, ſo, or to receive an Attornment to perfect his poſſeſſion. It was reſolv'd in Sir Moyl Finch's Caſe, that the Ceſtuy uſe ſhould, notwithstanding diſtrain, and have the ſame advantage, as if the Conizees poſſeſſion had been perfected by Attornment and ſeiſin.

The intent of the Statute of 27. which was to bring together the poſſeſſion and the uſe, when the uſe was to one or more perſons, and the poſſeſſion in one or more other ſeparate perſons, was ſoon after the Statute wholly declined, upon what good conſtruction or inference I know not.

For now the uſe (by the name of truſt) which were one and the ſame before the Statute, remains ſeparately in ſome perſons, and the poſſeſſion ſeparately in others, as it did before the Statute, and are not brought together but by Decree in Chancery, or the voluntary Conveyance of the poſſeſſor of the Land, to Ceſtuy que truſt.

So as now the principal uſe of the Statute of 27. eſpecially upon Fines levied to uſes, is not to bring together a poſſeſſion and uſe, which at no time were ſeparate the one from the other, but to introduce a general form of Conveyance, by which the Conizers of the Fine, who are as Donors in the Caſe, may execute their intents and purpoſes at pleaſure, either by transferring their Eſtates to Strangers, by enlarging, diminiſhing, or altering them, to and among themſelves; at their pleaſure, without obſerving that rigour and ſtrictneſs of Law for the poſſeſſion of the Conizee, as was requiſite before the Statute.

Which I have ſufficiently evidenc'd by ſhewing that the Attornment of the Leſſee to the Conizee or Reverſioner, or of the Tenant to him, as Grantee of the Rent-charge, is now diſpens'd with, which was not before the Statute.

For if that were now requiſite, the Conizers could not only not diſtrain for the Rent due before the Fine, but not for the Rent due ſince the Fine; nor doth the Statute help the matter, becauſe the Ceſtuy que uſe is in poſſeſſion of the Rent by the Statute, and therefore needs no Attornment, ſo that is true, when the Conizee hath a perfect poſſeſſion, but without Attornment the Conizee had no perfect poſſeſſion impowring him to diſtrain; and therefore the Statute can bring no perfect poſſeſſion to the uſes to that end.

And

And so Sir Edward Coke agrees the Law, that since Littleton wrote, If the Conizee of a Fine befoze Attornment by Deed indented and inroll'd, bargains and sells a Seigniorie to another, the Bargainee shall not distrain, because the Conizee, that is, the Bargainor, could not for want of Attornment. Cok. Litt. f. 307. Sed. 334.

But on the other side, a man perfectly les'd of a Seigniorie Rent, Reversion, or Remainder, bargains and sells by Deed indented and inroll'd, according to the Statute, the Bargainee shall distrain without Attornment by vertue of the Statute.

And if a Fine be now levied to a man to the use of a third person, the third person shall distrain without any Attornment made, not only to himself, by reason of the Statute, but to the Conizee, by the Resolution in Sir Moyle Finch his Case, for otherwise the Fine were to little purpose.

Which Case, though it make an Attornment not necessary, where it is impossible to be had, that the Conveyance might not be useless in effect, and an intended right to be de novo introduced, altogether hindred.

Shall it therefore destroy an old Attornment, which cannot but be had, and is still in being, for no other use or end, but to deprive the Conizers of a Rent and former Right justly due, to introduce a general inconvenience upon all that have granted Leases for lives, and are occasioned to settle their Estates?

And there is great difference between a Fine levied of a Reversion, or of a Rent-charge, to the use of a third person, and to the use of the Conizers; for a third person can never distrain, unless either an Attornment were to the Conizee, which is impossible, because no possession continues in him, so as to receive an Attornment; or unless the construction of the Statute (according to Sir Moyle Finch his Case) to make the Conveyance of effect to Cestuy que use, made the Attornment, because it could not be had, not necessary, which is a great strain and violence upon the true reason of Law.

That a Conveyance, which in reason could not be good without Attornment, should be sufficient, because it could not have an Attornment, which was necessary to make it sufficient.

And this practice hath been frequent since the Statute of Uses; Sir Will. Peltam's Case. as in making a Recovery against his nature to be a forfeiture, because taken as a Common Conveyance: To make Uses declared by Indenture between the parties, made a year after the Recovery, to be the Uses of the Recovery, with such Limitations as are mentioned in Downan's Case, the 9. Rep. Downan's Case, 9. Rep.

*L. Cromwell's  
Case, 2. Rep.  
f. 72. b.*

To make a Rent arise out of the Estate of Cestuy que use upon a Recovery, which was to arise out of the Estate of the Recoveror and his possession. which is a principal point in Cromwell's Case, and resolv'd; because by the intention of the parties, the Cestuy que use was to pay the Rent.

*14 Eliz. Har-  
well versus  
Lucas.  
Moore's Rep.  
f. 99. a. n. 243.*

Bracebridge's Case is eminent to this purpose. Tho. Bracebridge, seiz'd of the Mannor of Kingbury in Com. Warwick, made a Lease for One and twenty years of Birchin Close, parcel del Mannor to Moore; and another Lease of the same Close for Six and twenty years, to commence at the end of the first Lease, to one Curteis, rendering Rent, and after made a Feoffment of the Mannor, and all other his Lands, to the use of the Feoffees and their Heirs and Assigns, upon Condition that if they paid not 10000 l. within fifteen daies, to the said Tho. Bracebridge or his Assigns, they should stand seiz'd to the use of Bracebridge and Joyce his Wife; the Remainder to Thomas their second Son in tail, with divers Remainders over: The Remainder to the Right Heirs of Thomas the Father; Livery was made of the Land in possession, and not of Birchin Close, and no Attornment; the Feoffees paid not 10000 l. whereby Bracebridge the Father became seiz'd, and the first Tenant for years attorn'd to him. Adjudg'd.

1. That by Livery of the Mannor, Birchin Close did not pass to the Feoffees without Attornment.

2. That the Attornment of the first Lessee was sufficient.

*Moore f. 99.  
n. 243.*

3. Though the use limited to the Feoffees and their Heirs, was determined before the Attornment, yet the Attornment was good to the contingent use, upon not paying the money.

In the Resolution of this Case, *Wild, Archer*, and *Tyrell*, Justices, were for the Plaintiff, and *Vaughan*, Chief Justice, for the Defendant.

*Trin. 21. Car. II. C. B. Rot. 1714.*

The King Plaintiff, in a *Quare Impedit*, per *Gallfridum Palmer* Attornatum suum Generalem.

*Robert Bishop of Worcester*, *Thomas Jervis* Esquire, and *John Hunckley* Clerk, Defendants.

**T**HE King counts, That Queen Elizabeth was seisd of the Advowson of the Church of Norfield, with the Chappel of Coston in gross, in Fee in Jure Coronæ, and presented one James White her Clerk, who was admitted, instituted and inducted.

That from the said Queen, the Advowson of the said Church, with the said Chappel, descended to King James, and from him to King Charles the First, and from him to his Majesty that now is, who being seisd thereof, the said Church, with the Chappel, became void by the death of the said James White, and therefore it belongs of right to him to present, and the Defendants disturb him, to his damage of 200 l. which the said Attorney is ready to verifie for the King.

The Defendants plead severally, and first the Bishop, that he claims nothing in the said Church, and the Advowson but as Ordinary.

The Defendant Jervis saith, That long before the said Presentation suppos'd to be made by the late Queen, one Richard Jervis Esquire, was seisd of the Mannor of Norfield, with the Appurtenances in Com. prædicto, to which the Advowson, Ecclesiæ prædictæ tunc pertinuit, & adhuc pertinet in his Demesne as of Fee, and so seisd, the said Church became void by the death of one Henry Squire then last Incumbent of the said Church, and so continued for two years, whereby the said late Queen, prætextu lapsus temporis, in default of the Patron, Ordinary, and Metropolitan, Ecclesiæ prædictæ pro tempore existentis dictæ nuper Regine devoluit by her Prerogative; afterward, that is, tercio die Decembris, 28 Eliz. by her Letters Patents under the Great Seal, bearing date the said year and day at



Westminster, to the said Church, then being void, presented the said James White, who was admitted, instituted, and inducted, tempore pacis, &c.

That the said James White being so Rector of the said Church, and the said Richard Jervis seisd of the said Mannor to which the said Advowson pertained, &c. the said Richard after, at Norfield aforesaid, died so seisd.

30. March.  
14 Car. 1.

After whose death, the same descended to one Thomas Jervis Esquire, as Son and Heir of Richard, and from him descended to one Sir Thomas Jervis Knight, who entered, and was seisd, and so seisd the said Sir Thomas Jervis, March the 30th. 14 Car. 1. by his Deed in writing, seal'd at Norfield aforesaid, granted to one Phineas White the Advowson of the said Church, for the first and next avoidance only, whereby the said Phineas was possessed for the next avoidance of the said Advowson, and so possessed, the said Church became void by the death of the said James White, which was the first and next avoidance after the said Grant to Phineas.

Phineas, by virtue of his said Grant, presented one Timothy White his Clerk, who was thereupon admitted, instituted, and inducted, tempore pacis tempore Car. 1.

The said Timothy being Rector, and the said Sir Thomas Jervis seisd as aforesaid, The said Sir Thomas died seisd at Norfield aforesaid, and the said Mannor, with the Appurtenances, descended to Thomas the Defendant, as his Son and Heir, who entered, and was, and yet is seisd, and being so seisd, the said Church became void by the death of the said Timothy White, and the said Thomas Jervis, the Defendant, presented the other Defendant, John Hunckley, who was admitted, instituted, and inducted, long before the writ purchas'd.

Then Traverseth *Absque hoc*, That the late Queen was seisd of the said Advowson, with the Chappel of *Coston* aforesaid in gross, and as of Fee, *Jure Corona sua, Et hoc paratus est verificare*, and demands Judgment *si Alit*.

John Hunckley the Incumbent taking by protestation, That the late Queen was not seisd, nor presented, as by the Declaration is suppos'd; for Plea saith, That Richard Jervis was seisd of the Mannor of Norfield, with the Appurtenances, in Com. pradiſo, and the Advowson of the said Church appertain'd thereto, and pleads the same Plea verbatim, as to the Queens Presentation of White, and all other things, as Jervis the Patron pleaded, and the presentation of himself, and that he was, by the presentation of the other Defendant Jervis, admitted, instituted,

inſtituted, and induc'd into the ſaid Church, Septemb. 15. 1660. and Traverſeth.

*Absque hoc*, that the King was ſeis'd of the ſaid Advowſon and Chappel in Groſs, as of Fee, *Et hoc paratus eſt verificare*, and demands Judgment.

The Attorney General replies, and as to the Biſhop, claiming nothing, but as Ordinary, Demands Judgment, and a Writ to the ſaid Biſhop, and hath it with a Ceſſet Executio, untill the Plea determined between the King and the other Defendants.

And as to the Plea of the ſaid Thomas Jervis the Patron, the Attorney maintains the Seiſin of the late Queen, and of King James, King Charles the Firſt, and of the King that now is, of the ſaid Advowſon of the ſaid Church and Chappel, as by the Count beſoze is declared.

And that the ſaid Phineas White of his own wrong, by uſurpation upon the late King Charles the Firſt to the ſaid Church, then void by the death of the ſaid James White, preſented the ſaid Timothy White, and Traverſeth.

*Absque hoc*, That the Advowſon of the ſaid Church was, or is, pertaining to the Mannor of Norfield, and demand Judgment, and a Writ to the Biſhop.

And as to the Plea of the Incumbent, the Attorney replies as beſoze to the Patrons Plea, That the late Queen, King James, King Charles the Firſt, and the King that now is, were ſeis'd of the ſaid Advowſon in groſs, as of Fee; and that the ſaid Phineas White preſented the ſaid Timothy, by uſurpation upon King Charles the Firſt, and Traverſeth the appendancy of the Advowſon, *Eccleſia prædicta*, to the Mannor of Norfield.

The Patron Jervis rejoyns and demurs upon the Attorney's Replication, as inſufficient, and assigns for Cauſe, that the Attorney hath Travers'd matter not traverſable, and that the Traverſe ought to have been omitted out of the Replication, as alſo, that the ſaid Plea is repugnant in it ſelf, and wants form.

And John Hunckley the Incumbent rejoyns, That the ſaid Advowſon is pertaining to the ſaid Mannor, as he alledged in his Plea beſoze, *Et de hoc ponit ſe ſuper Patriam*, and the Attorney ſimiliter.

## Imperfections in the Pleading.

1. Upon this Quare Impedit brought, there is a good Title to present surmis'd for the King, but no more, and there is much difference between a Title appearing for the King, and suppos'd only.

2. The Defendant by his Plea in Barr, hath not well Travers'd the King's Title, for it is travers'd but in part, for only the Seisin of the Advowson in the Queen is travers'd, whereas properly the Seisin and Presentation of the Queen, by reason of her Seisin, ought to have been traversed: by Absque hoc, That the Queen was seisd of the Advowson in gross, and presented.

Fitz. N. Br. f.  
31. Letter D.  
Littl. Coke  
294. b.

3. The Seisin of the Advowson which makes not a Title alone, nor is not either traversable or inquirable by the tender of a demy mark in the King's Case, in droit d'Advowson, is not traversable neither alone in a Quare Impedit. But no Demurrer being thereupon, nor no Issue taken upon that Traverse, no more shall be said of it.

4. The King may alledge Seisin, without alledging any time (as Sir Edward Coke saith) in a droit d'Advowson.

26 H. 8. f. 4. a.  
Hob. Digby &  
Fitz. herb. f.  
102. and  
Moore and  
Newmans  
Case, f. 80.  
and 103.  
Rice and  
Harrisons  
Case, Yelver-  
ton f. 211.

5. The Defendants Traverse was not necessary, because he had confels'd and avoided the Queens Presentation, by saying it was by Lapse, if the Defendant had rested upon avoiding the Queens Presentation.

6. The Attorney General ought to have maintain'd his Count, and travers'd the Queens Presentation by Lapse.

7. He doth not do so, but deserts making the Kings Title appear, and falls upon the Plaintiffs Title, that the Advowson was not appendant.

8. He offers a double Issue, that the Presentation of Phineas White was by Usurpation, and the Advowson not appendant to the Mannor.

Certain

### Certain Premiffes.

If a man Counts or Declares in a Quare Impedit, That he, or his Anceſſors, or ſuch from whom he claims, were ſeiſ'd of the Advowſon of the Church, but declares of no Preſentation made by him or them, ſuch Count or Declaration is not good; and the Defendant may Demurr upon it, ſo is the expreſs Book following.

1. A man ſhall not have a Quare Impedit, if he cannot alledge a Preſentation in himſelf, or in his Anceſſor, or in another perſon, throught whom he claims the Advowſon, and that in his Count, unleſs it be in a ſpecial Caſe. Then puts that ſpecial Caſe, As if a man at this day, by the Kings Licence, makes a Parochial Church, or other Chantry, which ſhall be preſentable, if he be diſturbed to preſent to it, he ſhall have a Quare Impedit, without alledging any preſentment in any perſon, and ſhall Count upon the ſpecial Matter.

Firzh. Nat. Be.  
f. 33. Letter M.

And the Law in this, is the ſame in Caſe of the King with a Common Perſon, by all the Books and Preſidents in the Books of Entry.

To this add the Lord Hobarts Judgment, which is alwaies accurate for the true reaſon of the Law. Know that though it be true, that a Preſentation may make a Fee without moze (as a Preſentation by Uſurpation doth) that you never have a Declaration in a Quare Impedit, that the Plaintiff did preſent the laſt Incumbent without moze; but you declare that the Plaintiff was ſeiſ'd in Fee, and preſented, or elſe lay the Fee ſimple in ſome other, and then bring down the Advowſon to the Plaintiff, either in Fee, or ſome other eſtate.

L. Hobart  
Digby's Caſe;  
f. 101.

The reaſon is, That the Preſentment alone is militant and indiſſerent, and may be in ſuch a Title as may prove, that this new Avoidance is the Defendants, and therefore you muſt lay the Caſe ſo, as by the Title you make, the Preſentation paſſ joyn'd to your Title, ſhall prove that this Preſentation is likewise yours, as well as the laſt.

Whence it follows, That to Count of an Eſtate and ſeiſin without a Preſentation, or of a Preſentation without an Eſtate, are equally vicious and naught, be it in the Caſe of the King, or of a Common Perſon, and was never in Example or Preſident.



2. A second necessary Premise is this, and is both natural and manifest; When you will recover any thing from me, it is not enough for you to destroy my Title, but you must prove your own better than mine.

For it is not rational to conclude, you have no right to this, and therefore I have; for without a better right melior est conditio possidentis regularly.

Hobart. f. 162.  
Colt & Glo-  
vers Case ad  
finem paginae.

3. Every Defendant may plead in a Quare Impedit the General Issue, which is ne disturba pas, because that Plea doth but defend the wrong wherewith he stands charg'd, and leaves the Plaintiffs Title, not only uncontroverted, but in effect confess'd; and the Plaintiff may, upon that Plea, presently pray a Writ to the Bishop, or at his choice maintain the Disturbance for damages.

Hob. Digby  
versus Fitz-  
herbert f.  
103, 104.

But if a man will leave the General Issue, and controvert the Plaintiffs Title, he must then enable himself, by some Title of his own, to do it; but yet that is not the principal part of his Plea, but a formal Inducement only: And therefore there is no sense, if you will quarrel my possession, and I to avoid your Title effectually, do induce that with a Title of my own, that you shall say upon my Title, and forsake your own; for you must recover by your own strength, and not by my weakness.

The Lord Hobart goes further, in giving the reason of this course of Pleading, in Colt and Glovers Case, in the place beforecited, of this form of pleading in Law, there is one reason common to other Actions, wherein Title is contain'd to the Land in question specially, which is, that the Tenant shall never be receiv'd to Counter-plead, but he must make to himself, by his Plea, a Title to the Land, and so avoid the Plaintiffs Title alledg'd by Traverse, or confessing and avoiding—But in the Quare Impedit there is a further reason of it, for therein both Plaintiff and Defendant are Actors one against another; and therefore the Defendant may have a Writ to the Bishop as well as the Plaintiff, which he cannot have without a Title appearing to the Court: And so are the Precedents, when a Quare Impedit is brought against the Patron for disturbance of his Clerk, not being in possession.

Rastal L. In-  
tratio f. 484.  
a.b.

## The Case in brief , and the Question upon it.

Upon the Record, as it hath been open'd, and the pleading therein between the King and the Patron, upon which all the Question ariseth first, I shall not make the Question to be; Whether there may be a Traverse taken upon a Traverse (though that Question be in truth in the Case) for that is a Question rather upon terms of Art, than a *Questio Forensis*, and rising upon the naked fact of a Case depending in Judgment.

I shall therefore make the Question upon this Case, such as nakedly it is; without involving it in any difficulty of terms.

The King brings a *Quare Impedit*, and declares, That Queen Elizabeth was seisd of the Advowson of the Church of Norfield in gross, as of Fee, and presented, and derives the Advowson to himself, and the Church became void by the death of the Queens Presentee; and he is disturbed to present by the Defendant Jervis.

The Defendant saith, That before the Queen presented, R. Jervis, his Ancestoz, was seisd in Fee of the Mannor of Norfield, to which the Advowson of this Church is appendant, that it became void by the death of one Squire, and continued so for two years, and that the Queen then presented White her Clerk by lapse: That the Mannor and Advowson descended from Richard to Thomas Jervis, from Thomas to Sir Thomas Jervis, who granted the next avoidance to one Phineas White, who presented, upon the death of James White, one Timothy White, who was instituted and inducted, and then derives the Mannor and Advowson to himself; and that the Church becoming void, upon the death of the said Timothy, he presented the other Defendant Hunckley, and Traverseth the Queens Seisin of the Advowson in gross.

The

## The Law in Caſe of a Common Perſon.

If a Common Perſon brings a Quare Impedit, and counts his Title to preſent, and that he is diſturbed : The Defendant, to counter-plead the Plaintiffs Title, makes (as he muſt) a Title to himſelf to preſent, and confeſſes and avoids, or Tra- verſeth the Plaintiffs Title.

1. The Plaintiff ſhall never deſert his own Title, and by falling upon, and controverting the weakneſs only of the Defendants Title, ever recover or obtain a Writ to the Biſhop, though the Defendants Title do not appear to the Court to be ſufficient for the unanſwerable Reaſons given by the Lord Hobart in the firſt place.

2. If you will recover any thing from another man, it is not enough for you to deſtroy his Title, but you muſt prove your own better than his.

3. There is no ſenſe, if you will quarrel my poſſeſſion or Right, and I, to avoid your Title effectually, either by Traverſing it, which is denying, or confeſſing and avoiding it, do induce that with a Title of mine own, that you ſhall ſay up- on my Title to impeach it, and forſake your own, as I ſaid before.

4. Though I ſhould, being Plaintiff, make it appear to the Court, That the Defendants Title is not good, but no way making it appear that my own Title is good, what induce- ment can the Court have to judge for me, and againſt the De- fendant, when no more right appears for the one than the o- ther ; and not only ſo, but no right appears for either ? For in ſuch Caſe ſure, Melior eſt Condicio poſſidentis, I ought not to be ſued by him I have not wrong'd ; and he which hath no right, can ſuffer no wrong.

5. It is to no end the Plaintiff ſhould ſet forth any Title at all, if he be not to make it good ; but it ſhould ſerve his turn only to impeach the Defendants Title, and conclude ſo un- reaſonably, That if I can make it appear the Defendant hath not a good Title, therefore I have and muſt have Judg- ment for me.

How

How far, in the King's Case, the Law differs  
not from a Common Persons Case.

1. And where the King's Title, in a Quare Impedit brought by him, appears to be no more than a bare suggestion, the King can no more than a Common Person (and for the same reasons) forsake his own Title, and endeavour only the destroying of the Defendants Title; for the weakning of the Defendants Title without more, can no more make a good Title to the King, than it can to a Common Person.

2. If the King, or his Predecessor, hath presented by reason of Wardship, of Lapse, of the Temporalities of a Bishop, in his hands, of Outlawry, and in many other Cases, when the Church becomes void next after the Wards Age, and suing his Livery, after the death of him presented by Lapse, Restitution of the Temporalities, and Reversal of the Outlawry.

In all these Cases, if the King brings a Quare Impedit, and counts that he was seised of the Advowson in gross, and presented. When the true Patron shall confess his Presentation, and avoid it by shewing in their severall Cases, That his Presentation was in right of the Ward, by Lapse, by reason of Outlawry, or of Temporalities, being in his hands; The King shall desert his own Title, and controvert the Defendants respective Titles, in whose Right he did formerly present; and if their Title happen to appear not good, recover the second Presentation against those manifest Rules of Law delivered.

3. If this should be Law generally, then though the King have no Title to present, nor pretend to any, for it differs not, not to pretend at all, and not to be obliged to make good the Title pretended; it were a more compendious way, when any Patron presented, That the King should, by Scire Facias, compel him to set forth his Title, and Demurr upon it, or Traverse it, and recover the Presentation, if the Patrons Title were any way defective.



Wherein the Law differs in the Kings Case  
from a Common Persons Case.

But it must be agreed there are Cases in which the King may desert his own Title, and not joyn Issue upon the Defendants Traversing the King's Title, or avoiding it, but Traverse the Title made by the Defendant in his Barr, which is directly taking a Traverse upon a Traverse, which regularly a Common Person cannot do; nor I think in any Case, but where the first Traverse tender'd by the Defendant is not material to the Action brought, as in the Case of Masse in Long, 5 E. 4. Hob. Digby & Fitz-herbert's Case, & Woodroffe & Codford's Case, 37 Eliz. Hob. f. 105.

Long 5 E. 4.  
in Waste for  
cutting so many  
Trees, and  
selling them.  
f. 100. b.

13 E. 4. f. 8. a.  
3 H. 7. f. 3.  
Stamford  
Prerogative,  
l. 64. b.

The King counting of a Title to himself by Office found, or by other matter of Record, which is another thing than only surmising a Title, as in the Case at Barr, may chuse to maintain his own Title found by Office, and Traversed by the Defendant, or otherwise appearing of Record, and take a Traverse to the Title made by the Defendant.

The Reason is manifest; for the Office of it self is a Title appearing for the King, and he shall never lose his Possession, having a Title, but where the Defendants Title doth appear a better. But what is this that the King should Relinquish his own Title only surmis'd, and controvert the Defendants, whose Title, though it should appear naught, leaves no Title in the King: But when an Office is found, or a Title for the King appears by other matter of Record, if the Defendant have no Title, the King hath one by his Office, or other Record.

So is 13 E. 4.  
f. 8. and many  
other Books.

Some Books, prima facie, seem to make for that Opinion, That the King may generally desert his own Title, and take a Traverse to the Defendants.

Br. Prerogative,  
pl. 65.  
7 E. 6.

Brook Title Prerogative, pl. 65 Where a man Traverseth the Office of the King, and makes to himself a Title (ut oportet) Traversing the Title of the King contain'd in the Office, the King may chuse to maintain his own Title, or to Tra-

Traverse the Title alledg'd; for the King is not bound to stand to the first Traverse which tenders an Issue, but may Traverse the matter of the Plea of his Adversary: For this no ancient Book is cited.

But dicitur Hillar. 7 E. 6. quod sic utitur, in an Information put by the Subject for the King, in Scaccario, that where the Defendant pleads a Barr, and Traverseth the Information, the King may Traverse the matter of the Barr, if he will, and is not bound to maintain the matter contain'd in the Absque hoc. 7 E. 6.

This Case, as appears in the first part of it, was in the Case of an Office, and therefore makes not at all against my Diversity: In the latter part the Assertion seems more general, as if the King could in any Case desert to maintain the matter of his Information, and Traverse the Barr of the Defendant; but there is nothing in this part of the Case positive enough to over-rule my Difference, and is no more but Sic utitur ut dicitur in Scaccario, which may be a mistaken Report.

The other Case is likewise in Brook, but no ancient Book-  
Case cited, but only 38 H. 8. and no more. Br. Travers per sans ceo. p. 369. 38 H. 8.

An Information in the Chequer, the Defendant pleads, and Traverseth a material point in the Information, whereupon they are at Issue; there the King cannot waive this Issue, as he may in other Cases, where the King alone is party, without an Informer ut supra per Attornatum Regis, & alios legis peritos.

This Case seems likewise to conclude, That when the Information is only for the King, and a material point Traversed, upon which Issue is joyn'd, that the King is not bound to that Issue, but may take another. This dis-affirms the former Case, when the Information is by an Informer, the King must maintain his Information.

Note the close of this Case, Ut supra per Attornatum Regis, & alios legis peritos, I shall give the Case here mentioned in this ut supra, which will, I think, determine the Question, and clearly establish the Law according to the Difference taken.

That Case is likewise in Br. and cited to be as in 34 H. 8. whereof there is no Year-book, neither some four years befoze the last Case I mentioned. It is thus:

Br. Prerogative p. 116.  
34 H. 8.

Nora by Whorhood Attornatum Regis, & alios, When an Information is put into the Chequer upon a penal Statute, and the Defendant makes a Barr, and Traverseth, that there the King cannot wabe such Issue tender'd, and Traverse the former matter of the Plea, as he can upon Traverse of an Office, and the like, when the King is sole party, and intitled by matter of Record; for upon the Information there is no Office found befoze, and also a Subject is party with the King for a moiety, Quod nota bene.

Here it is most apparent, That upon an Information, when the King hath no Title by matter of Record, as he hath upon Office found, the King cannot wabe the Issue tender'd upon the first Traverse, though the Information be in his own name, which disaffirms the second Case in that point: And for the Supernumerary reason, That the King is not the sole party in the Information, it is but frivolous, and without weight; but the stress is where the King is sole party, and intitled by matter of Record.

I shall add another Authority out of Stamford Prerogative.

If the King be once seisd, his Highness shall retain against all others who have not Title, notwithstanding it be found also that the King had no Title, but that the other had possession befoze him, as appeareth in 37. Ass. p. 35. which is pl. 11. where it was found, That neither the King nor the party had Title, and yet adjudg'd that the King should retain; for the Office that finds the King to have a Right of Title to enter, makes ever the King a good Title, though the Office be false, &c. and therefore no man shall Traverse the Office, unless he make himself a Title; and if he cannot prove his Title to be true, although he be able to prove his Traverse to be true, yet this Traverse will not serve him.

Stamford  
Prerogative  
f. 62. b.

Stamford  
Prerogative,  
f. 64. b.

It is to be noted, That the King hath a Prerogative which a Common Person hath not; for his Highness may choose whether he will maintain the Office, or Traverse the Title of the party, and so take Traverse upon Traverse.

If the King take Issue upon a Traverse to an Office, he cannot in another Term change his Issue, by Traversing the Defendants Title, for then he might do it infinitely.

But the King may take Issue, and after Demurr; or first Demurr, and after take Issue, or he may vary his Declaration; for in these Cases, as to the Right, all things remain, and are as they were at first; but this ought to be done in the same Term, otherwise the King might change without limit, and tye the Defendant to perpetual Attendance.

13 E. 4. expressly, and several other Books. 28 H. 6. f. 2. a.

Judgment pro Defendente.

END.



Hill. 21 & 22. Car. II. C. B. Rot. 606.

*Thomas Rowe* Plaintiff; and *Robert Huntington* Defendant,  
in a Plea of *Trespass* and *Ejectment*.

**T**H E Plaintiff declares, That Thomas Wife, 1. April, 21 Car. 2. at Hooknorton in the County of Oxford, by his Indenture produc'd, dated the said day and year, demis'd to the said Thomas Rowe the Mannor of Hooknorton, with the Appurtenances, 4 Messuages, 100 Acres of Land, 50 Acres of Meadow, 400 Acres of Pasture, and 50 Acres of Wood, with the Appurtenances, in Hooknorton aforesaid. As also the Rectory and Vicaridge of Hooknorton, and the Tithes of Grain, Hay, and Wool, renewing in Hooknorton aforesaid; To have and to hold the Premises from the Feast of the Annunciation of the Virgin, then last past, to the end and term of Seven years then next ensuing.

That by virtue thereof, the said Thomas Rowe the Plaintiff, into the said Mannor and Tenements enter'd, and of the said Rectory, Vicaridge, and Tithes, was possessed.

That the said Robert Huntington the Defendant, the said First of April, with Force and Arms, into the said Mannor, Rectory, Vicaridge and Tithes, entred, and him Ejected against the Peace, to his great damage, and whereby he is endamaged 100 l.

The Defendant Huntington pleads not Culpable.  
And thereupon Issue is Joyn'd.

The Jury give a Special Verdict, That as to the Trespass and Ejectment in the said Mannor and Tenements, and in the said Rectory, Vicaridge, and Tithes aforesaid, excepting 200 Acres of Pasture, parcel of the said Mannor of Hooknorton, That the Defendant Huntington is not Culpable. And as to the said 200 Acres, they say, that long before the said Trespass and Ejectment,

That is, the 14th. day of October, 1. Mar. one Robert, then Bishop of Oxford, was seis'd in his Demesne, as of Fee in Right of his Bishoprick of the said Mannor, whereof the said 200 Acres are parcel, and so seis'd the said 14th. of October, 1 Maria, at Hook-

norton

*norton* aforeſaid, by his Indenture of Demiſe, ſeal'd with his Epiſcopal Seal, Dated the ſaid day and year, and ſhew'd in Evidence to the Jury, made between the ſaid Biſhop of the one part, and *John Croker* of *Hooknorton* Eſq; of the other part, for Conſiderations in the ſaid Indenture of Demiſe mentioned, had demiſ'd, and to farm lett, to the ſaid *Croker*; Among other things, the ſaid Mannor with the Appurtenances, whereof the ſaid 200 Acres are parcel, To have and to hold, to the ſaid *Croker* and his Aſſigns, from the end and expiration, *prieus Dimiſſionis in eadem Indentur. Mentionat.* for and during the term of Ninety years then next following.

The tenor of which Indenture of Demiſe follows, *in hac verba*:

This Indenture made the Fourteenth day of *October*, 1 *Maria*, &c. Between the ſaid Biſhop and the ſaid *John Croker*, &c. witneſſeth, That where the ſaid Biſhop, by the name of the Reverend Father in God, *Robert King*, Abbot of *Tame*, and Commendatory of the late Monastery of *Oſeney*, in the County of *Oxford*, and the Covent of the ſame, by their Deed Indented, Dated 6. *April*, 29 *Hen. 8.* with the Conſent of their whole Chapter, Have demiſ'd, and to farm lett,

All that their Manſion or Farm of *Hooknorton*, with the Appurtenances in the ſaid County, and all the Manſion and Farm Demefne, Lands, Meadows, Leaſowes and Paſtures, with all Commodities and Profits to the ſaid Mannor belonging or appertaining, and the cuſtomary works of all the Tenants, not granted nor remitted before the Date of the Deed; And the Parſonage of *Hooknorton*, and all Lands, Tenements, Meadows, Tithe Corn and Grain, Hay and Wool, and all Profits to the ſaid Parſonage belonging; And alſo the Vicaridge of *Hooknorton* aforeſaid, with the Appurtenances; And all Lands, Tithes, Profits, to the ſaid Vicaridge belonging.

And alſo a Paſture called *Preſſfield*, with the Appurtenances in *Hooknorton* aforeſaid; And all Commons of Sheep, call'd by the name of their Founders Flock; And the Hay of a Meadow, call'd *Brown-mead*, with the cuſtomary works thereto pertaining; And the Tithe and Duty of a Mead, call'd *Hay-mead* in *Hooknorton* aforeſaid.

Except and reſerved to the ſaid Abbot and Covent, and their Succeſſors, All Tenants and Tenantries, then, or after to be ſet by Copy of Court-Roll, All Fines, Reliefs, Eſcheats, Herriots, Amerciaments, Pains, Forfeits, and all Perquiſites of Courts Barons and Leets.

To

To have and to hold the said Farm or Mannor, and all other the Premisses, with the Appurtenances, Except before excepted to the said *Croker*, his Executors and Assigns, from the Feast of the Annunciation of our Lady last past before the Date of the said Deed, Indented for the term of Eighty years, rendring to the said Abbot, Covent, and their Successors yearly, during the said term.

For the said Mannor and Farm 9 l. For the said Parsonage 22 l. 2 s. For the Common of Sheep, Hay, and Custom-works of *Brown-Mead* 5 l. For the Wool 12 l. For *Prest-field* 6 l. 13 s. 4 d. For the Vicaridge 6 l. 13 s. 4 d. of lawful mony, &c. at the Feasts of St. *Michael* the Arch-angel, the Annunciation of our Lady, by equal portions. As by the same Deed Indented, amongst divers other Covenants and Grants, more plainly appeareth.

And where also, as the said Bishop, by his other Deed Indented, Dated 8. *October*, 1 *Edw.* 6. hath demis'd and to farm lett, unto the said *John Croker*, all that his Mannor of *Hooknorton* aforesaid, with all Messuages, Tofts, Cottages, Orchards, Curtilages, Lands, Tenements, Meadows, Leafowes, Pastures, Feedings, Commons, waste Grounds, Woods, Underwoods, Waters, Mills, Courts-Leets, Fines, Herriots, Amerciaments, Franchises, Liberties, Rents, Reversions, Services, and all other Hereditaments whatsoever they be, ser, lying, and being in *Hooknorton* aforesaid, in the said County, with the Appurtenances.

Except certain Lands and Tenements in the said Town in the Tenure of the said *John Croker*, for certain years then enduring.

To have and to hold, All the said Mannor of *Hooknorton*, and all other the Premisses, with the Appurtenances, Except before excepted to the said *John Croker* and his Assigns, from the Feast of St. *Michael* the Arch-angel last past, before the Date of the said latter Deed Indented, to the full end of the term of Ninety years from thence next ensuing.

Rendring to the said Bishop and his Successors yearly, during the said term, Eleven pounds, four shillings, and nine pence, at the Feasts of the Annunciation and St. *Michael* the Arch-angel, by equal portions, as by the said latter Deed, among other Covenants and Grants, more plainly appears.

The Reversion of all which Premisses are in the said Bishop, and to him and his Successors do belong, as in Right of his Church.

Now

Now witneffeth, That the faid Bifhop hath demis'd, and to Ind. 1 Mar.  
Farm lett, and by thefe Prefents doth demife, &c. to the faid  
*John Croker*, All the faid Mannor and Farm of *Hooknorton*, toge-  
ther with all Meffuages, &c. And all and fingular other the Pre-  
miffes, with the Appurtenances, in the faid feveral Indentures  
specified and contain'd.

To have and to hold the faid Premiffes contain'd in the faid firft  
Indenture, to the faid *John Croker*, his Executors and Affigns,  
from the end, expiration, and determination of the faid term spe-  
cified in the faid firft Indenture, unto the end and term of Ninety  
years next enfuing, yielding therefore yearly to the faid Bifhop  
and his Succelfors, for the faid Premiffes, specified in the faid  
firft Indenture, fuch and like Rents as in the faid firft Indenture are  
referv'd, at the fame daies and times; and

To have and to hold, All the Premiffes specified in the faid lat-  
ter Indenture, from the end, expiration, and determination of the  
faid term specified in the faid latter Indenture, until the end and  
term of Ninety years then next enfuing: Rendring yearly for the  
Premiffes in the faid latter Indenture specified, fuch and like Rent  
as is reserv'd by the faid latter Indenture, and at the fame days and  
times.

Then follows a Clause of Distrefs if the Rent be behind for a  
Month.

And if the faid feveral yearly Rents referved by thefe Indentures,  
or any of them be unpaid in part, or in all, by the fpace of one  
quarter of a year after any the faid Feafis, at which the fame ought  
to be paid, and be lawfully demanded; and no fufficient Distrefs  
upon the Premiffes, whereupon the fame is referved to be found;  
Then to be lawful for the faid Bifhop, and his Succelfors, into fuch  
of the Premiffes, whereupon fuch Rents being behind, is, or are re-  
ferved, to re-enter, and to have as in their former eftate.

And the faid Jurors further fay, That the aforefaid Indenture of  
Demife afterwards, the Tenth of *May*, Anno 1 Mar. aforefaid, by the  
then Dean and Chapter of *Oxford*, under their Common Seal, was  
confirm'd, and find the tenor of the Confirmation *in hac verba*.

They further find, That the faid Two hundred Acres of Pasture,  
at the time of making the faid Indenture, and at the time of the  
Trespafs and Ejectment, were, and yet are parcel of the faid Mannor  
of *Hooknorton*.



They further find, That the Rent for all the ſaid demis'd Premiffes, referv'd by the ſaid Indenture for one whole half year, ended at the Feaſt of Saint *Michael* the Arch-angel, 1643. was behind and unpaid; and that *Robert*, late Biſhop of *Oxford*, the Nine and twentieth and Thirtieth Day of *December*, 1643. into the Parſonage Houſe then, and by the Space of Forty or Fifty years before, reputed and call'd the Mannor-houſe; And that he then, at the ſaid Parſonage-houſe, by the ſpace of One hour next before the Sun-ſetting of both the ſaid two daies, remain'd and continued until, and by the ſpace of One hour after Sun-ſetting of both daies, demanding, and then did demand the Rent for the half of the year aforeſaid.

They further ſay, That there was no ſufficient Diſtreſs upon the Premiffes at the time of the demand of the ſaid Rent thereupon; And that the ſaid Biſhop, the ſaid Thirtieth Day of *December*, 1643. aforeſaid, into the ſaid Premiffes enter'd.

They further ſay, That all the Right, State, and Title, term of Years, and Intereſt of, and in the Mannor, Tenements, Rectory, and other the ſaid Premiffes, by virtue of the ſaid Indenture of Demife by the ſaid late Biſhop, as aforeſaid, granted to the ſaid *John Croker*, by mean Assignments came to the ſaid *Thomas Wiſe*.

That by virtue of the ſaid ſeveral Assignments, the ſaid *Thomas Wiſe* afterwards, the Fourth of *January*, 1667. into the Premiffes enter'd, and was poſſeſſed for the Reſidue of the term of years, *prout Lex poſtulat*. That he ſo poſſeſſed, afterwards the ſaid Firſt Day of *April*, 21 Car. 2. at *Hook Norton* aforeſaid, demis'd to the ſaid *Thomas Rowe* the ſaid Mannor and Tenements, Rectory and Vicaridge whereof the ſaid Two hundred Acres are parcel.

To have and to hold, to the ſaid *Rowe* and his Assigns, from the Feaſt of the Annunciation laſt paſt, for the term of Seven years then next enſuing: That by virtue thereof, the ſaid *Rowe* enter'd, and was poſſeſſed, until the ſaid *Robert Huntington*, the ſaid Firſt of *April*, 21 of the King, by Force and Arms, by the command of the aforeſaid *Robert*, late Biſhop of *Oxford*, into the ſaid Two hundred Acres, upon the Poſſeſſion of the ſaid *Thomas Rowe*, to him demis'd by the ſaid *Wiſe*, as aforeſaid, for the ſaid term, not yet paſt, enter'd and Ejected him. But whether upon the whole matter, the ſaid *Robert* be Culpable of the ſaid Treſpaſs and Ejectment, they refer to the Court.

By this Clergia, in the recited Indenture, if any ſuch were, of 29 H. 8. the Farm of Hooknorton, and the Mannor of Hooknorton, were the ſame thing; and the Mannor known and demis'd by the name of the Farm, as well as the Farm by name of the Mannor. The Mannor of Hooknorton being call'd the Farm of Hooknorton, becauſe it was lett to Farm, and rented out; and the Farm call'd the Mannor, becauſe it had the Requiſits of a Mannor, viz. Demeſne & Services.

Therefore where it is recited in the Deed 1 Mar. That the Abbot and Covent of Oſney, had by their Deed of 29 H. 8. demis'd to John Croker, All that their Farm of Hooknorton, it was the ſame, as if it had been the Mannor of Hooknorton.

1. For that the next words are, And all that Maſſion Demeſne, Lands, Meadows, Leaſowes, and Paſtures to the ſaid Mannor belonging, and no Mannor is named before, but the Farm which was known to be the Mannor.

2. The Habendum of the Premises demis'd, is, To have and to hold the ſaid Farm or Mannor of Hooknorton, which alſo ſhews they were the ſame.

3. In the render of the Rent, it is yielding and paying for the ſaid Mannor and Farm Nine pounds.

4. By the Demise of 1 Mar. ſubſequent, the ſaid Mannor or Farm is demis'd.

And the 200 Acres in queſtion, being found to be parcel of the ſaid Mannor, conſequenty they are recited to be demis'd by that Indenture ſuppos'd of 29 H. 8. But the Jury find not the Mannor and Farm to be the ſame.

The next thing to be noted is, That by that recited Indenture of 29 H. 8. if any ſuch were, ſeveral Rents were reſerved upon ſeveral particulars, and not one intire Rent upon the whole, namely 9 l. upon the Mannor or Farm; Another Rent upon the Parſonage, another on the Vicaridge; and ſo upon ſeveral other particulars.

And by the Leaſe of 1 Maria, it is yielding and paying ſuch, and the like Rents, in the Plural Number, as are reſerved by the ſaid firſt Indenture. So as the Rents were ſeveral in the firſt Indenture, by the meaning of that of 1 Mar.

And yielding and paying ſuch and like Rent, as is reſerv'd by the latter Indenture, for the Premises therein contain'd. Here it is ſuch Rent, in the ſingular number, as is reſerv'd, not as are reſerved, as in the former.

Then in the Clause of Re-entry for Non-payment, it is that the Re-entry should be into such of the Premises, whereupon such Rent being behind was reserv'd, therefore not into all the Premises.

Whence it follows, That there being several Rents, several Demands were respectively to be made before Re-entry, as well for those reserv'd in the first Indenture, as for that in the second Indenture recited.

And it being found, That the Demand made by the Bishop at the Parsonage-house in Forty three, was for the half years Rent reserv'd of all the Premises demis'd by the Indenture of 1 Mar. it follows, That more Rent was demanded than was payable in any one place, consequently the Demand not good, nor the Re-entry pursuing it; and thus far the Case is clear against the Defendant: For the Lease of 1 Mar. could not be avoided by that Re-entry. in all, nor in part, if the Leases of 29 H.8. and 1 E.6. were well and sufficiently found by the Jury to have been made.

Note, The Jury finding that the Rent reserv'd for all the Premises, was behind for half a year, ending at Michaelmas, 1643. not expressing the Sum of the Rent, is no more than to find, That no Rent was paid for the said half year.

And their finding, That the Bishop did demand the said half years Rent, finding no Sum by him demanded, is no more than to find, That he demanded such Rent as was due for the said half year. So as notwithstanding the Juries finding, That no Rent was paid for the said half year, and their finding of the Bishop's demanding of what was due for the said half year; It doth not therefore follow, That they find any Rent to be reserv'd by the said Lease of 1. Mar. or that there was a Demand of any Rent admitted to be so reserv'd.

But if the Leases of 29 H. 8. and 1 E. 6. be not well and sufficiently found by the Jury to have been made; The Consequent then is, That in Law there are no such Leases; for de non apparentibus, & non existentibus eadem est ratio ad omnem juris effectum.

And then it follows, That the Lease of 1 Mar. of all the Premises specified in the Indenture of 29 H. 8. and of all specified in the Indenture of 1 E. 6. for Ninety years Habendum, from the respective Expirations of the terms specified, and under the respective Rents reserv'd by those Indentures, will be void as to the terms intended to be granted, and the Rents reserv'd, because the beginning of the terms and particulars of the Rents

can

can be known, but from the Demises 29 H. 8. and 1 E. 6. when no such Demises are, because the Jury hath found no such.

For this the Case of 3 E. 6. reported by the Lord Brooks, in his Title of Leases, N. 62. is clear, and in several Cases since adjudg'd, is admitted for good Law.

The Case is, If a man Leases Land for certain years to J. S. Habendum post dimissionem inde factam to J. N. finitum, and J. N. hath no Lease of the Land, the Lease to J. S. shall commence immediately for the term of years granted him. Re. tit. Leases,  
N. 66. 3 E. 6.

So in our Case, the Lease of 1 Mar. of the Mannor and other the Premises granted to Croker for Ninety years, Habendum, as to some particulars, from the expiration of a former Lease granted 29 H. 8. And as to other particulars, from the expiration of a Lease granted 1 E. 6. when no such Leases were granted, because not found to be granted. Therefore the Lease of 1 Mar. for Ninety years, shall commence immediately from the Sealing, and consequently ended about the 21 or 22 of King Charles the First.

And then the Defendant Huntington's Entry, the First of April, 21 Car. 2. by command of the Bishop, was lawful, the term of Ninety years granted 1 Mar. and then beginning, being long before expired.

And by the same Reason, If a Lease be granted to J. S. for Forty years, to commence after the expiration of the term granted to J. N. and under the same Rents as are reserv'd in the Demise to J. N. (who in truth had no Demise) The term of Forty years to J. S. shall commence immediately, because the number of years are express'd, but without any Rent; because the reservation of such Rent as was reserv'd in the Demise to J. N. who had no Demise, must be no Reservation of Rent.

And consequently in the present Case, though the Lease for Ninety years, which number of years is express'd, be a good Lease, to commence immediately from 1 Mar. yet the Reservation of the Rent being such thereupon as was reserv'd by the Leases of 29 H. 8. and 1 E. 6. when in truth there are no such Leases, must be a void Reservation upon the Lease of 1 Mar. because there is no expression of any Rent, but that which was reserv'd in Leases, which are not at all Ad omnem Juris effectum in this Case, because they are not found.



So as the sole Question is reduc'd to this, Whether by this Verdict the Jury have well and sufficiently found any Leases 29 H. 8. and 1 E. 6. or either of them were made to Croker?

1. And it seems clear, That the Jury have not in express terms, and positively found, either of those Leases to have been made, for then they must have found that the Abbot Commendatory of Osney, and the Covent there, had made such Lease to Croker, dated 29 H. 8. &c. and in like manner that the said Abbot being then Bishop of Oxford, had made 1. of E. 6. a Lease to Croker for such a term of years, and under such Rents and Reservations, &c. but there is no such finding in this Verdict.

2. The second Inquiry is, Whether the Jury having found (as they have) that the then Bishop of Oxford did by Indenture, dated 1. Mar. Lease to Croker the Mannor of Hooknorton for Ninety years, which Indenture they find in hæc verba, in which there is a recital of a Lease made 29 H. 8. and of another 1 E. 6. to the said Croker (but neither in hæc verba) be not a good and sufficient finding of such recited Leases, to have been actually made, because recited in the Lease of 1 Mar. which is expressly found to have been made.

But certainly, it can never follow that the reciting of the Deeds of 29 H. 8. and 1 E. 6. to have been made in the Deed of 1 Mar. which is expressly found to have been made, is a sufficient finding of those two other Deeds to have been actually, & re vera made; for the strange consequence of that would be,

1. That no Deed really seal'd and deliver'd between the parties to it, and so agreed to be, could make recital of a thing which was false, or which was not according to the recital, which is a senseless Assertion.

2. By that reason all Fables recited, nay, all sorts of recited lies, at least (all such as had possibility of being true) would become truths, whether orally recited, or in Books, Letters, or other Writings; for the difference of recital any other way, and recital in a Deed, will not vary the Case, because the recital in a Deed may as equally be false, as in other ways of recital; unless a man think that any false recital in a Deed shall be a conclusion against the parties, and such as claim from them, which I shall anon make appear to be false.

3. It were perniciously dangerous, That Recitals in a true Deed, that other Deeds were ſeal'd and deliver'd, ſhould make ſuch Deeds recited in Law, to be true Deeds; ſoꝛ then by ſeign'd Recitals of other Deeds in a true Deed, men might make what Titles they pleas'd.

4. It would be worſe than actual forging of ſuch recited Deeds, becauſe the forgery of Deeds is puniſhable, and thereby ſuch Deeds made ineffectual; but falſe Recitals are neither puniſhable, noꝛ the effect of them deſtroy'd, if they ſhould be admitted: But this is ſo clear, that I ſhall ſay no moꝛe in it.

If then thoſe two Deeds be neither directly found, noꝛ the finding a Recital of ſuch Deeds in the Deed of 1 Mariz, be a ſufficient finding of them, it remains, if they be found at all, they muſt be found by Inference and Argument only. And as ſoꝛ that, though in a general Verdict, finding the point in Iſſue, by way of Argument, ſoꝛ the Plaintiff oꝛ Defendant, be never permitted, not though the Argument be neceſſary and concludiꝛg.

As in an Action of Debt brought ſoꝛ 20 l. the Defendant plead'd payment, and iſſue thereupon. The Jury found that the Defendant deſer the 20 l. this was no good Verdict; ſoꝛ the matter in iſſue, payment oꝛ not, was not directly found, but by way of Argument, though the Argument was neceſſary there, that the Defendant did not pay the 20 l. which he did owe, ſoꝛ he could not both pay it, and yet owe it. And this Caſe was affirmed in Error.

Rolls 693.  
Barry & Phillips, N.30.

Yet I confeſs in a Special Verdict, That ſtrictneſs is not rigidly obſerv'd, where the Jury find only the matter of Fact, when in a general Verdict they find both Fact and Law, that is, the whole matter in iſſue; yet in a Special Verdict they muſt find the Caſe in Fact clear, and without Equivocation to common intent, elſe they find nothing whereupon the Court can determine what the Law is.

There are no words in this Special Verdict that can be ſtrain'd to a finding of the Deeds of 29 H. 8. and 1 E. 6. by way of Inference and Collection, but theſe.

They find that Robert, Biſhop of Oxford, by Indenture dated the 14th. of Octob. 1 Mar. demis'd to Croker the Mannor of Hooknorton, with the Appurtenances, *inter alia Habendum*, to the ſaid Croker, and his Aſſigns, from the end and expiration, *prioris dimiſſionis in eadem Indentur. mentionat.* for and during the term of 90 years then next following: The tenor of which Indenture follows *in hec verba*, and ſo find the Indenture of 1 Mar. verbatim, but not the tenor dictæ prioris dimiſſionis, ſoꝛ if they had ſo found, it had varied the Caſe.

Which

Which finding only of the Deed of 1. Maria, verbatim, and that thereby the Mannor of Hooknorton was demised for Ninety years, a fine prioris dimissionis in the Indenture of 1. Maria mentioned, it cannot be made out by any rational Inference, That they have clearly found such a former Demise, or otherwise than as recited to have been by the Indenture of 1. Maria.

For to find that such a Letter was written, or such a Book made by J. S. is not to find that all things, or any thing contain'd or mention'd in that Letter or Book, are, or is true.

No more finding a certain Deed, as that of 1. Maria, to be seal'd and deliver'd by J. S. is not a finding that every thing mentioned or recited in that Deed, is true.

### The Context of the *Verdict* explain'd.

I find it conceiv'd by some, That by the words of the *Verdict*, Habendum à fine prioris dimissionis in Indentura prædict. mentionat. the Jury have found two things.

The first from the words Habendum à fine prioris dimissionis, That there was a former Demise from the Expiration of which the term granted 1. Maria begins.

The second from the words In Indentura prædict. mentionat. That such former Demise is mentioned in the Indenture 1. Mar.

And thence conclude, That a former Demise, mentioned in the Indenture of 1. Mar. is by the Jury found to have been actually made: And consequently the sense of the words of the *Verdict*, and Jury's meaning must be, as if they had been Habendum, from the Expiration of a former Demise, and which former Demise is mentioned in the Indenture of 1. Mar.

But surely there is a clear difference between the Juries finding a former Demise to be, and their finding a former Demise mentioned to be: For a former Demise may be found mentioned to be, which notwithstanding never was.

The words therefore of the *Verdict*, genuinely read and expounded, are, Habendum from the Expiration of a former Demise (not which positively was) but Habendum from the Expiration of a former Demise mentioned in the Indenture of 1. Mar. to be.

But

But a Demise may be mentioned in the Indenture of 1 Mar. to be, which yet never was.

And then the meaning of the words and Jury will evidently be Habendum, from the Expiration of a former demise which the Indenture of 1 Mar. mentions, recites, or saith to be formerly made.

And by this the Jury do not find, That any former demise, mention'd in the Indenture of 1 Mar. was really made.

I must agree, That as a Witness may prove the Contents of a Deed or Will, so may a Jury find them, the Deed or Will it self not being found in hæc verba.

But if a Jury, by their Verdict, shall take upon them to collect the Contents of a Deed, and yet by the same Verdict find that Deed in hæc verba, the Court is not to regard the Collection they have made of the Substance of the Deed, but the Deed it self.

As for instance, If a demise should be made to J. S. for a certain term of years, Habendum, from the day of the making the demise, and the Jury should find the Deed made to J. S. for the term Habendum from the making of the demise, Cujus quidem Indent. fact. to J. S. tenor sequitur in hæc verba.

By this Verdict, it both appear'd what Collection the Jury made in their Judgment of the Habendum, of the Deed to J. S. and also what the Deed it self syllabically was, which barred from what the Jury conceiv'd it to be; for the Habendum in the Deed appears to be from the day of making of the demise; but the Jury collected it to be from the making. Here the Court shall not regard the Collection by the Jury, but the Deed it self, as to the Commencement of the Term.

1. So in the present Case, the Jury finding, That the Bishop of Oxford, by his Indenture of 1 Mar. demis'd the Mannor of Hooknorton Habendum, from the Expiration of a former demise therein mention'd, for Ninety years, and then setting forth the Indenture verbatim; is not a finding at large; and as if no lease verbatim, were found that the Bishop made a lease for Ninety years, to begin from the Expiration of a former demise, made 29 H. 8 or 1 E. 6. for a certain term, but is a Collection of the Substance, as they conceiv'd of the Deed of 1. Mar. which immediately they find in hæc verba.



And conſequently, the Deed it ſelf being ſyllabically found, the Court is not to regard their Collection of the purpoſe of it.

2. Another Reason is, That if thoſe words in the Verdict, Habendum from the end of a former Demiſe mentioned in the ſaid Indenture, had been omitted, and they had only found the Biſhop had Seal'd and Executed the Indenture, 1 Mariae, to Croker, Cujus quidem Indent. tenor ſequitur in hæc verba, &c. all that is pretended to be found by this Verdict, had been as fully, and more clearly found, by finding the Indenture of 1 Mar. only.

For finding that Indenture in hæc verba, they had found that the Biſhop had demiſ'd the Mannor of Hooknorton, Habendum, from the Expiration of a former Demiſe therein mentioned for Ninety years; which is all they have now found. Therefore the finding by way of redundance, over and beſides finding the Deed it ſelf, what was equally found in finding the Deed only, is not to be regarded, but as over-doing and impertinent.

3. Beſides, ſuch a conſtruction of the Verdict makes it abſolutely equivoical and uncertain; for if the words, Habendum à ſine prioris dimiſſionis in Indentura prædicta. mentionat. be but their Summary Collection of what the Indenture 1 Mar. contains, then it is but finding a recital of a former Demiſe; but if otherwiſe, it is finding a former Demiſe really and poſitively, which do toto cælo diſſerre, and confound the Judgment of the Court.

4. Put the Caſe any other perſon, having ſeen the Deed of 1 Mar. ſhould be asked, What the effect of it was? his Answer would be, as the Jury have found, That it was a Demiſe by the Biſhop of Oxford to Croker, of the Mannor of Hooknorton, and other things Habendum for Ninety years, from the Expiration of a former leaſe mentioned in that Demiſe.

But ſuch Answer did not aſſert, That there was actually ſuch a former Demiſe, as is mentioned in that Deed of 1 Mar.

Why then muſt the Jury, aſſerting but the ſame thing in the ſame words, be ſtrain'd to aſſert more, viz. That there actually was ſuch a former Demiſe as is recited in the Indenture 1 Mariae?

5. Either

5. Either this Habendum à fine prioris dimissionis in the Indenture of 1. Maria, said to be mentioned, is intended by the Jury to be the Habendum of the Deed of 1. Maria, or not; if the Habendum of that Deed, then nothing is found by it, but what is found by finding the Deed itself of 1. Maria, and then it is Habendum à fine dimissionis of a Deed only recited in that of 1. Maria, and no more; but if not, and that by finding this Habendum, more be found than by finding the Deed of 1. Maria barely, then two Habendums of the same thing are found for the Deed of 1. Mar.

6. Beyond all this, if the Juries finding that the then Bishop of Oxford, by his Indenture 1. Maria, did, inter alia, demise to Croker the Mannor of Hooknorton, Habendum à fine prioris dimissionis in Indentura prædict. mentionat. shall be (as is contended) an absolute and positive finding of a former Demise made, to whose expiration the Indenture 1. Maria refers, it must be either the demise 29 H. 8. or that of 1. E. 6. for no other are mentioned in the Indenture 1. Mar. and it can be but a finding of one of them; for the words, à fine prioris dimissionis in Indentur. prædict. mentionat. cannot possibly extend to both.

Be it then understood the Demise 1. E. 6. for in that the Mannor is clearly named; the Consequence must be, That the Deed of 1. Mar. which is an intire lease, as well of the Mannor, as of the Vicaridge, Parsonage, and of other things under several Rents, for Ninety years, commencing, as to the Mannor, from the Expiration of the suppos'd Demise 1. E. 6. shall be a good lease for Ninety years thence forwards, because that recited Demise is also suppos'd to be positively found by the Jury, by those words of their Verdict.

But as to the Vicaridge, Parsonage, and other things, and the Rents thereupon reserv'd, which are demis'd by the Indenture of 1. Mar. for Ninety years, to commence from the Expiration of the other recited Demise, suppos'd in 29 H. 8. the lease of 1. Mar. must commence immediately from the Date, because the Jury have not found that recited Demise positively, but only as recited, and therefore not found it to be a real Demise, and consequently the lease of 1. Maria, as to those particulars, referring the term to commence from the Expiration of a term granted 29 H. 8. not in esse, because not found, must begin from 1. Mar. which, doubtless, the Jury never intended.

But now for Authority, I will resume the Case formerly cited of 3 E. 6. in the *Loyd Brook*. If A. makes a Lease to B. Habendum for Forty years, from the expiration of a former Lease made of the Premises to J. N. and this be found occasionally, by Special Verdict, as our Case is; but the Jury in no other manner find any Lease to be made to J. N. then as mentioned in the Lease to B. By the Resolution of that Book, the Lease to B for Forty years, shall begin presently.

And who will say in this Case, That because the Jury find a Lease made to B. for Forty years Habendum, from the Expiration of a former Lease made to J. N. that therefore they find a Lease made formerly to J. N. when in truth J. N. had no such Lease; for they only find what the Habendum in the Lease to B. is, which makes a false mention of a former Lease to J. N. but had no Evidence to find a Lease which was not.

Exactly parallel to this is our present Case; the Jury find the Bishop of Oxford, by a Lease dated the Fourteenth of October, 1 Maria, demised to *Croker* the Mannor of Hooknorton, Habendum, to him and his Assigns for Ninety years, from the Expiration of a former Demise, mentioned in the said Indenture of Lease 1 Maria: But do not affirm or find, explicitly or implicitly, any former demise made when they only find summarily the Habendum of the Lease, 1 Maria, which mentions such a former Demise.

Cr. 10 Car. 1.  
f. 397.

Another Case I shall make use of, is the Case of *Miller and Jones* versus *Manwaring*, in an Ejectment brought in *Chester*, upon the Demise of *Sir Randolph Crew*: The Jury in a Special Verdict found, That *John Earl of Oxford* and *Elizabeth* his Wife, were seisd in Fee in Right of *Elizabeth*, of the Mannor of *Blacon*, whereof the Land in question was parcel, and had Issue *John*; the said *John*, Earl of *Oxford*, by Indenture dated the Tenth of *February*, 27 H. 8. demis'd the Mannor to *Anne Seaton* for Four and Thirty years, *Elizabeth* died 29 H. 8. And the said Earl of *Oxford* died *March* 31. H. 8.

After-

Afterwards *John* the Son, then Earl of *Oxford*, the Thirtieth of *July*, 35 H. 8. by Indenture reciting the Demise to *Anne Seaton*, to be dated the Tenth of *February*, 28 H. 8. demis'd the said Mannor to *Robert Rochester* Habendum, after the End, Surrender, or Forfeiture of the said Lease to *Anne Seaton* for Thirty years.

It was adjudged first in *Chester*, and after, upon Error, brought in the Kings Bench; It was resolv'd by all the Judges (who affirmed unanimously the first Judgment) That the Lease to *Rochester* began presently at the time of the Sealing, for several Reasons.

1. Which is directly to our purpose, because there was no such Lease made to *Anne Seaton*, having such beginning and ending as was recited in *Rochester's* lease.

2. Because the lease made by *John*, first Earl of *Oxford*, was determined by his death, Three years before *Rochester's* lease, and consequently no lease in esse when the lease was made to *Rochester*; which Reasons are in effect the same, viz. That a lease made to commence from the end of any lease suppos'd to be in esse, which indeed is not, the lease shall commence presently.

From this Case these Conclusions are with clearness deducible.

1. That if a lease be found specially by a Jury, in which one or more other leases are recited, the finding of such lease is not a finding of any the recited leases: Therefore the finding of the lease made to *Rochester*, was not a finding of the lease therein recited, to be made to *Anne Seaton* in any respect.

2. The second thing clearly deducible out of this Case, is, That although the Jury, by their Special Verdict, did find that *John the Son*, Earl of *Oxford*, did by his Indenture demise to *Rochester* for Thirty years, the Mannor of *Blacoh*, Habendum, from the End, Surrender, or Forfeiture of a former lease thereof made to *Anne Seaton*, dated the Tenth of *February*, 28 H. 8. yet this was not a finding of any such lease made to *Anne Seaton*, but only a finding of the Habendum, as it was in the lease made to *Rochester*, which mentioned such a lease to be made to *Anne Seaton*.



So in our present Case, the Jury finding that the Bishop of Oxford, 1 Maria, did demise the Mannor of Hooknorton to John Croker Habendum, for Ninety years, from the Expiration of a former Demise mentioned in the Indenture of 1 Mar. is not a finding of any such former Demise to be made; but a finding, that in the Indenture 1 Maria, it is suggested there was such a former Demise, and no more.

And if any man shall object, That in Rochester's Case the Reason why no such lease is found to be made to Anne Seaton, in 28 H. 8. to be, because it is found that the lease made to Anne Seaton was in 27 H. 8. that is not to the purpose, because the Jury might find, and truly, that a lease was made to her, Dated the Tenth of February, 27 H. 8. but that was no hindrance; but that another lease was made to her in 28 H. 8. as is mentioned in Rochester's lease, which had been a Surrender in Law of that made in 27 H. 8.

Therefore it is manifest, That the sole Reason why no such lease was admitted to be in 28 H. 8. is no other than, because the Jury find no such to have been made, but find a suggestion of it only in Rochester's lease: And it is the same exactly in our present Case.

The third thing deducible from the Case, is, That a Demise by Indenture for a term Habendum, from the Expiration of another recited or mentioned term therein, which is not (or not found to be, which is the same thing) is no Estoppel or Conclusion to the Lessee or Lessor, but that the Lessee may enter immediately, and the Lessor demise or grant in Reversion after such immediate lease.

There is another Case, resolv'd at the same time, between the same Persons, and concerning the same Land, and published in the same Report, and specially found by the same Jury. Edward<sup>e</sup> Earl of Oxford, Son of John, the Son of John Earl of Oxford, by Indenture between him and Geoffry Morley, Dated the Fourteenth of July, 15 Elizabethæ, reciting, That John his Father, by Indenture the Thirtieth of July, 35 H. 8. had demised to Robert Rochester the said Farm or Mannor of Blacon, Habendum for Thirty years, from the end or determination of the lease made to Anne Seaton, the Tenth of February, 27 H. 8. which is a false recital; for the lease to Rochester was to commence from the end or determination of a lease made to Anne Seaton, that is recited to be made the Tenth of February, 28 H. 8. and that after.

35 H. 6. 34 Br.  
Tit. Falts. p. 4.  
12 H. 4. 23 Br.  
Falts 21.

afterwards, the said John Earl of Oxford, had granted by Indenture, Dated the Six and twentieth of March, 35 H.<sup>8</sup>. reciting the lease to Anne Seaton, the Tenth of February, 27 H. 8. to Hamlett Freer, the Reversion of the said Mannor of Blacon, Habendum, the said Mannor and Premises from such time as the same shall revert, or come to the possession of the said Earl, or his Heirs, by Surrender, Forfeiture, or otherwise, for Sixty years, for so is the Case put in one part of the Report; but in another part of it, it seems to be, That the Demise to Freer was when it should revert, after the Expiration, Surrender, or Forfeiture, omitting the words, or otherwise of the Lease made to Anne Seaton, which will nothing vary the Case. The said Edward, Earl of Oxford demised the said Mannor or Farm of Blacon, to the said Geoffry Morley, Habendum, from the end of the said Leases for Fifty years.

The Question was, Whether any of these leases, made either to Hamlett Freer or Morley, be good, or were in esse at the time of the lease, made by Sir Randolph Crew to the Plaintiff: Sir Randolph Crew claiming the Inheritance from the Earl of Oxford, and Sir William Norris the Leases from Freer and Morley, and under him the Defendant. And Judgment was given in Chester for the Plaintiff.

And upon a Writ of Error of this Judgment brought in the Kings Bench, wherein the Error assigned was, The giving of Judgment for the Plaintiff. After several Arguments at Barr, and at the Bench, Seriatim by the Justices, it was unanimously agreed, The Judgment in Chester for the Plaintiff should be affirmed.

And that neither the Lease to Freer, nor that to Morley, was good to avoid the Plaintiffs Title.

As for the lease to Freer, it being a grant of a Reversion nominally, and by Agreement of Parties, there being no Reversion, because no lease, at the time of the Grant, was in esse, either of Seaton or Rochesters, upon a point of Rasure in Rochester's Demise found in the Case, and for that Land in possession, could not pass by the name of a Reversion, though by the name of Land a Reversion may pass; for he who will grant Land in possession, cannot be thought not to grant the same, if only in Reversion, according to the doctrine of Throgmorton's Case in the Commentaries.

L. Chandoes  
Case, 6. Rep.

And

And for that Morley's lease was to commence after the lease granted to Rochester, which was to commence after that granted to Seaton the Tenth of February, 27 H. 8. whereas no such lease was granted to Rochester, but a lease to commence after one granted to Seaton, in 28 H. 8. It was resolv'd, None of those leases were in esse, and that Morley's lease commenced therefore presently.

The words of the Resolution are these, as to Morley's Lease; It was Resolv'd that Morley's Lease was not *in esse*, for that misrecites the former Leases, and so hath the same Rule as the former, where it recites Leases and there be none such; Therefore it shall begin from the Date, which being in the Fifteenth of the Queen, for Fifty years, ended 1623. which was before the Lease made to the Plaintiff; for these Reasons Judgment was affirmed.

The same Conclusions are deducible from this lease to Morley, as from the former to Rochester, and therefore I will not repeat them: But here are two Judgments in the very point of our Case, and affirmed in a Writ of Error unanimously in the Kings Bench.

And where it is thought material that the Jury have found a half years Rent to have been behind at Michaelmas, 1643. and thence infer'd, the Jury have found the leases by which that Rent was ascertain'd, namely, the leases of 29 H.8. and 1 E. 6.

Surely if a lease be for a term of years, to commence from the end of a former term, and for such Rent as is refer'd upon such former Demise that never was; as no term can commence from the end of another which never was, so no Rent can be behind, which cannot appear but by a Demise which was never made, that is, which is never found to be made.

Add further, That if the Jury had found the Leases of 29 H. 8. and 1 E. 6. to have been made, as is mentioned in the lease of 1 Mar. that had not been a sufficient finding of them.

For a Deed is not found at all, nor a last Will, when only the Jury find but part of the Deed or Will, for the Court cannot Judge but upon the whole, and not upon part.

It it be found in Affise the Defendant was Tenant, and disseis'd the Plaintiff, nisi verba contenta in ultima voluntate W.M. give a lawful Estate from W.M. to R.M. and find the words contain'd in the Will, but not the Will at large; the Court can  
not

cannot judge upon this *Verdict*, whose Office it is to judge upon the whole Will which is not found. 38, 39 El. B. R. West and Mounfons Case, Rolls 696. Title Tryal.

38, 39 El. B. R.  
West and  
Mounfons C.  
Rolls 696.  
Tit. Tryal.

So for the same reason, finding but part of a recited Deed, and not the whole, is as if no part were found, and it appears by the Deed of 1 Maria, that both Deeds of 29 H. 8. and 1 E. 6. are recited therein but in part; for after as much as is recited of either Deeds respectively is said, as more plainly appears among other Grants and Covenants in the said Deed.

And if other Grants were in the Deed of 29 H. 8. besides those recited, then the express Grant of the very Mannor of Hooknorton, might be one of those Grants which is urg'd not to be granted, because not recited in 29 H. 8. nominally, and if so, here being two former demises of the Mannor mentioned in the Indenture 1 Mar. and for different terms; the one 29 H. 8. for Eighty years, the other 1 E. 6. for Ninety years, and so expiring at different terms, it is uncertain from which Expiration the demise of the Mannor 1 Mar. shall Commence, and consequently the demise having no certain Commencement, will be void by the Rector of Chedington's Case, 1 Rep.

But admitting the Mannor not demis'd by 29 H. 8. yet the Jury finding the demise 1 Mar. Habendum à fine prioris dimissionis, and not prioris dimissionis ejusdem Manerii, it is uncertain still, whether the Habendum à fine prioris dimissionis, as the Jury have found it, shall refer to the end of the demise 29 H. 8. or to that of 1 E. 6. both of them being prior demises mentioned in the Indenture 1 Mar. for if only the demise 29 H. 8. had been mentioned in that of 1 Mar. the demise 1 Mar. for its Commencement, must of necessity have refer'd to the Expiration of the demise by 29 H. 8. though the Mannor pass'd not by it, and it will not then change the uncertainty, because the demise 1 E. 6. is mention'd.

Now shall you, to this finding of the Jury, suppose a different finding from their finding barely the Indenture of 1 Mar. call in aid any thing from the Recitals in 1 Mar. and so make up a *Verdict*, partly from what the Jury find expressly, and partly from what is only recited, and not otherwise found.



As for instance, The Jury find the Mannor demis'd for Ninety years, Habendum, from the end of a former demise mention'd 1 Mar. This Verdict in it self, finds no Commencement of the term, by not finding from the Expiration of which term it begins, nor find no Rent reserv'd. But the demise of 1 Mar. as to them, must be made out from the recitals of Deeds not found to be real, which is a way of confounding all Verdicts.

When the Jury say, The Mannor of Hooknorton was demis'd à fine prioris dimissionis in Indentura predicta. mentionat. for Ninety years, they do not say, à fine prioris dimissionis ejusdem Manerii.

So as if nothing else were, the former Indenture mention'd might be of the Vicaridge, or any other thing, and not at all of the Mannor; and yet by the Indenture of 1 Mar. the demise of the Mannor was to Commence from the Expiration of such former demise, whatever was demis'd by it.

But the Indenture of 1 Mar. demiseth all the Premises contain'd in the first Indenture, Habendum from the Expiration of the term.

Ergo, If the Mannor be not compris'd in the first Indenture, it cannot be demis'd by 1 Mar. from the Expiration of the first term in the first Indenture.

But admitting this, Who can say the Mannor of Hooknorton is not compris'd in the first Indenture.

For first, What if only part of the first Indenture is recited, and not all, in the Deed of 1 Mar. and so the Mannor omitted in the recital, though it were compris'd in the Indenture of 29 H. 8. and perhaps the Jury might, if that Indenture were produc'd to them, see it was compris'd in the Indenture, though not recited to be so.

2. What if the Indenture of 29 H. 8. were mis-recited in 1 Mar. and instead of the Mannor, the word Mansion recited?

3. It is apparent, That the Indenture of 29 H. 8. was not recited, nor pretended to be recited verbatim in that of 1 Mar.

Because after so much of the Indenture of 29 H. 8. as is recited in that of 1 Mar. it is said, as by the said Indenture, viz. 29 H. 8. among divers other Covenants and Grants, more plainly appeareth.

So as there were other Grants in the said Indenture of 29 H. 8. than are recited in 1 Mar. and the Grant of the Mannor by name might be one of them.

4. How can it appear to us, but that the Jury did find the Mannor of Hooknorton to be expreſly demis'd by the firſt Indenture, if any thing were demis'd by it.

If then the Jury did conceive the Mannor of Hooknorton was demis'd by the firſt recited Indenture, as moſt probably they did:

When they find, That by the Indenture of 1 Mar. the ſaid Mannor was convey'd à fine prioris dimiſſionis in Indentur. prædict. mentionat. And there are mentioned in the Indenture of 1 Mar. two former demises of the Mannor, viz. that of 29 H. 8. for a term of Eighty years, and that of 1 E. 6. for a term of Ninety years, there is no certain Commencement of the term of 1 Mar. becauſe it is as uncertain from which of the two former demises it takes his Commencement, as if ten former demises were mention'd, and for different terms, and then it could Commence from neither of them. \*

But admit it ſhould be taken to Commence from the end of the term of 1 E. 6. and not from the other, becauſe in that term (if any ſuch were) the Mannor is without ſcruple demis'd; yet we muſt remember, the preſent Queſtion is not of the Mannor, but of Two hundred Acres, parcel of the Mannor. And in the Leaſe of 1 E. 6. though the Mannor be demis'd, yet there is an Exception of certain Lands and Tenements in the Town or Vill of Hooknorton, which Croker then held for certain years enduring.

How doth it appear, That the Two hundred Acres in queſtion, were not thoſe Lands excepted out of the demise of 1 Maria? For though they were parcel of the Mannor, they might be ſeverally demis'd and excepted; and though it be found, Cok. Litt. 325. a. That at the time of the Demise, and at the time of the Cref. paſs, the Two hundred Acres were parcel of the Mannor, it is not found that they were not part of the Lands in the Will of Hooknorton, at the time of the demise made 1 Mar. then in Leaſe to Croker, and excepted out of the ſaid demise of 1 Mar. for if they were, the Plaintiff makes no Title to them.

If the Iſſue be, whether by Cuſtome of the Mannor a Copyhold is grantable to Three for the Life of Two, and it be found that by the Cuſtome it is grantable for Three Lives, that is not well found, for it is but an Argument, That becauſe a greater Eſtate may be granted, a leſs may, and a new Venire Facias granted, becauſe the matter in Fact, whereupon the Court was to judge, and was the point of the Iſſue, was not found. 15 Jac. B.R. between Venn and Howel. Rolls 693. Title Tryal.

Hill, 10 Car. 1.  
B. R. Wilkin-  
son and Me-  
riams Case,  
Rolls 700. &  
701. Tit. Try-  
al.

If a Jury find that J.S. was seiso'd in Fee of Land, and posses'd of certain Leases for years of other Land, made his Will in writing, and thereby devis'd his Leases to J.D. and after devis'd to his Executors the residue of his Estate, Mortgages, Goods, &c. his Debts being paid, and funeral Expences discharg'd. It being referred by the Jury to the Court, Whether by this devise the Executor hath an Estate in Fee, or not? This is no perfect special Verdict; because the Jury find not the Debts paid, and the Funeral Expences discharg'd, which is a Condition precedent to the Executors having an Estate in Fee, and without finding which the Court cannot resolve the matter to them refer'd by the Jury; Therefore a Venire facias de novo was awarded.

Judgment was given for the Defendant.

*Trin.*

*Trin. 22. Car. II. C. B. Rot. 461.*

*Richard Edgcomb* Knight of the Bath, Executor of *Pierce Edgcomb* Esquire, his Father, is Plaintiff.

*Rowland Dee* Administrator of *Charles Everard* Esquire, during the Minority of *Charles Everard*, Son of the Intestate, Defendant.

In an Action of the Case upon an *Assumpsit*.

**T**H E Plaintiff declares, That the Intestate, the Thirteenth of July, 1664. at London, in the Parish of St. Mary Bow, in the Ward of Cheap, in consideration that the said *Pierce Edgcomb* would, at his request, lend him 500 l. promis'd the said *Pierce* to repay it within Seven daies after demand with Interest, after the rate of 4 l. per Centum.

That thereupon the said *Pierce Edgcomb* after, at the time and place aforesaid, did lend the said Intestate 500 l.

That the said *Pierce*, the Testator, afterwards, the Fourteenth of July, 17 Car. 2. at the place aforesaid, required the Intestate to pay the said 500 l. with Interest, after the rate aforesaid, both which amounted to the Sum of 520 l.

He says further, That the said Intestate was indebted to *Pierce* the Testator, the Fourteenth day of July, 1664. in the Sum of 500 l. for money before that time to him lent by the said *Pierce*.

And in Consideration thereof, the said Fourteenth of July, 1664. in the said Parish and Ward, promis'd to pay when requir'd.

But that neither the Intestate in his life time, nor the Defendant, to whom the Administration of his Goods were committed, during the Minority of *Charles Everard*, Son of the said Intestate, at London, in the Parish and Ward aforesaid, did pay the said Sums, nor either of them, amounting to 1020 l. to the said *Pierce Edgcomb* in his life time, nor to the said *Richard*, the Plaintiff, after his death; Though required by the Intestate afterwards in his life time, that is, upon the First of August,



gust, 17 Car. 2. And the said Defendant, after the death of the Intestate, viz. the Tenth day of March, 18 Car. 2. and often after, at the said Parish and Ward, by the Testator Pierce were requir'd. And the said Defendant, after the death of the Testator, the First day of January, 21 Car. 2. was required, at the place aforesaid, by the Plaintiff, to pay the said money, which he did not, and still refuses, to his damage of 200 l.

The Defendant pleads payment after the Plaintiffs Writ purchas'd, of several great debts due by Bond and Bills obligatory from the Intestate, to several persons at his death, in number One and thirty.

That the Intestate, the Two and twentieth of December, 16 Car. 2. became bound in a Recognizance in the Chancery to Sir Harbottle Grimstone Baronet, Master of the Rolls, and to Sir Nathaniel Hobart, one of the Masters of the Chancery, in 2000 l.

And that the said 2000 l. is still due and unpaid, and the said Recognizance in its full force, unsatisfied or discharged.

He pleads, the City of London is an ancient City, and that within it, time out of mind, hath been held a Court of Record of the Kings, &c. before the Mayor and Aldermen of the said City, in Camera *Guild-hall* ejusdem Civitatis, of all personal Actions arising and growing within the said City.

That the Intestate, at the time of his death, was indebted apud London prædict. in the Parish and Ward, prædict. to one William Allington in 2670 l. 17 s. 7 d. And who, after the purchase of the Plaintiffs Writ, the Tenth of March, the Eighteenth of the King, came to the said Court, before Sir Thomas Bludworth then Mayor, and the Aldermen in the said Chamber, according to the Custome of the said City, held, us'd, and approv'd.

Et prædictus *Willielmus Allington* tunc & ibidem in eadem Curia secundum consuetudinem prædictæ Civitatis, affirmabat contra prædictum *Rolandum Dee* ut Administratorem, &c. quandam Billam originalem de placito debiti super demand. Mille sexcentarum & septuaginta librarum, & decem & septem solidorum, & septem denariorum legalis monete, &c.

And that it was so proceeded, according to the Custome of the said City, that the said William Allington had Judgment to recover against the Defendant the said Debt, and 85 l. 16 s. for damages, &c.

And

And that after, the Defendant, in full satisfaction of the said Judgment, paid to the said William Allington the Sum of 2670 l. and 17 s.

Then pleads about Four and twenty Recoveries and Judgments thereupon in the Kings Bench, in Pleas of Debt without Specialties, all satisfied but one of 7000 l. and more, due to one Cornwallis.

Then pleads Plene administravit, all the Goods of the Intestate, at the time of his death, to be administered, and that he had not die Impetrationis brevis Originalis prædicti, nec unquam postea aliqua bona seu cattalla prædicti, *Car. Everard*, tempore mortis suæ in manibus suis administrand. præterquam bona & cattalla ad valentiam separatum denariorum summarum per ipsum sic, ut præfertur solutorum in exonerationem, separatum Judiciorum, scriptorum obligatorum, & billarum obligatarum prædicti.

Ac præter alia bona & cattalla ad valentiam decem solidorum, quæ executioni Recognitionis prædictæ ac Judicii prædicti per præfatum *Carolus Cornwallis* versus ipsum, ut præfertur recuperat, onerabilia & onerata existunt.

Et quod ipse *Rolandus* modo non habet aliqua bona seu cattalla quæ fuerunt prædicti. *Caroli* tempore mortis suæ administrand. præter prædicta bona & cattalla ad valentiam prædictorum decem solidorum quæ executioni recognitionis prædictæ ac Judicii prædicti per præfatum *Carolus Cornwallis* recuperat, sic ut præfertur onerata & onerabilia existunt. Et hoc paratus est, &c. Et petit Judicium. Then

Averss the debts, so as aforesaid by him paid, to be bona fide paid, & pro veris & justis debitis, owing and unpaid by the Intestate at the time of his death.

And that the several Judgments aforesaid, against him recovered, were so true and just debts of the Intestate, owing by him at the time of his death.

The Plaintiff taking, by protestation, that nothing alleged by the Defendant was true, Demurrs upon the Plea.

The Causes offer'd to maintain the Demurrer, are these:

1. That one of the Judgments pleaded in Barr obtain'd by William Allington in the Court of London, before the Mayor, &c. against the Defendant for 2670 l. 17 s. 7 d. due to the said Allington by the Intestate Everard, was not duly obtained, and is insufficient to Barr the Plaintiff.

2. That

2. That the Defendants special Plea in Barr appearing in any part of it to be false and insufficient, the Plaintiff ought to have Judgment for his whole debt.

1. For the first Cause, it was urg'd as an Exception to the Defendants Plea, That by the Plea it appears, that time out of mind a Court hath been held in the City of London, before the Mayor and Aldermen, of all personal Actions arising and growing within the said City.

And that the Intestate was, at the time of his death, indebted to the said Allington at London, within the Parish and Ward of St. Mary Bow and Cheapside.

But it is not alledg'd, That the said debt did arise and grow due in London, within the said Parish and Ward; for wheresoever the debt did arise and grow due, yet the debtor is indebted to the creditor in any place where he is, as long as the debt is unpaid.

And therefore to say, The Intestate was indebted to Allington in the said Sum apud London, &c. affirms not that the debt did arise and grow due at London; and if not, the Court had no Jurisdiction of the Cause.

The effect of the Defendants Barr is only to shew, That such a Judgment was obtain'd in such a Court against him, and not to set forth the whole Record of obtaining it; for it were vast Expence of time and money so to do, as often as occasion is to mention a Record, and refers to the Record, prout per Recordum plenius liquet, where the Plaintiff may take advantage of any defect therein. But if that were necessary, it is well set forth; for his Plea is,

Et prædictus *Willielmus Allington* tunc & ibidem in eadem Curia secundum consuetudinem Civitatis prædictæ, affirmabat contra prædictum *Rolandum Dee* ut Administratorem, &c. quandam billam originalem de placito debiti, &c.

And the Custome being to hold Plea of personal Actions arising within the City, if he affirmed a Bill of Debt, according to the Custome,

It must be of a debt arising and growing due within the City.

2. A second Exception was, That it is not set forth for what the debt was, whereby the Court may judge whether it were payable or not by the Administrator.

1

To this it was answer'd, That the course in London is for the Plaintiff to declare that the Debtor being indebted to him at such a time and place, Concessit solvere, such a Sum to him, at such a time, for they enter not there at large, as at Westminster, all the pleading; and the City Customs have been often confirmed by Parliament, and if Exception be taken to the Jurisdiction, it must come from the Defendant.

However that will not avoid the Judgment, and is but Error.

3. A third Exception was, It is not set forth that the Intestate was indebted to Allington in his own right.

But it must be intended if he were indebted to him by Law, that it was in his own right.

4. A fourth Exception was, That the Defendant pleads Judgment was given for the Plaintiff, quod recuperaret debitum praedictum; where the Judgment should be quod recuperet.

It is not the Defendants concern to recite the words of the Judgment, as it was given by the Court, but the effect of it relating to the Defendant, and so it is more proper to say Judgment was given quod recuperaret. The Court say, ideo consideratum est per Curiam; but he who relates what they did, saith, ideo consideratum fuit per Curiam. But my Book is quod recuperet.

5. A fifth Exception was, That the Plea sets forth the Action was brought against the Defendant Dee in London, as Administrator of the Intestate, omitting durante minori etate Caroli Everard filii.

That will not avoid the Judgment, though the Minor were of Age sufficient to administer himself; nor is it of prejudice to any, as was resolved in the Case of one Pincet.

But if an Administrator, durante minori etate, brings an Action, he must aver the Administrator or Executor to be under the Age of Seventeen years.

6. Sixthly, it was urg'd as resolv'd in Turners Case, That the Recital of Allingtons Declaration in London, not mentioning the Debt to be per scriptum obligatorium, it shall not be intended to be so.

And it was urg'd as resolv'd in that Case of Turner also, That it being a Debt but by simple Contract, the Administrator was not chargeable with it.

That is a Resolution in Turners Case supernumerary, and not necessary to support the Judgment given, and consequently no Judicial Resolution for the Judgment given in Turners Case was well given, because the Judgments given before the Mayor of Cicester, pleaded in barr of the Plaintiffs Action were

Rolls; Good  
& Pincet's  
Case, Tit. Ex-  
ecutors f. 910.  
14 Car. 1. B. R.  
Piggots Case,  
5 Rep.

Turners Case  
8. Rep. f. 132.



were resolv'd to be coram non Iudice, because it appear'd not that the Mayor of Cicester had any Jurisdiction to hold Plea by Patent of Prescription.

But admitting that an Executor or Administrator, according to that Resolution, is not chargeable (if by chargeable be meant compellable) at the Common Law in an Action of Debt brought upon a simple Contract of the Testator or Intestate, to pay such Debt; what would it avail the Plaintiff in that Case, or can in this Case, unless the Resolution had been, That though the Jurisdiction of the Court of Cicester had been well set forth, yet a Judgment there obtain'd against the Executor, upon a simple Contract of the Testators, had been no Barr in an Action of Debt brought upon an Obligation of the Testators (But there is no such Resolution there) for a Judgment obtain'd upon such a simple Contract, is as much a Judgment when had, as any other, upon Obligations, and the Books and use are clear, That Judgments must be satisfied before Debts due by Obligation. It is true, it is a Waste of the Goods of the Dead in the Executor, to pay voluntarily a Debt by simple Contract before a Debt by Obligation whereof he had notice (and not otherwise) in that Case. But no man ever thought it a Devastavit in the Executor, to satisfy a Judgment obtain'd upon a simple Contract, before a Debt due by Obligation.

Yet I shall agree, the Executor by the Common Law, might have prevented this Judgment, by abating the Plaintiffs Writ at first, which he had power lawfully to do, but he had equal power lawfully not to abate it, and us'd that last lawful power, and not the first, and wrong'd none in using it.

To this may be added, That the Judgment upon a simple Contract is the Act of the Court, and compulsory to the Executor, and he hath then no Election, but must obey the Judgment.

In conclusion though it were agreed, That in the Action of Debt brought by Allington upon a simple Contract, Judgment ought not to have been given against the Defendant being Administrator, but the Writ should have abated, because the Administrator was not chargeable. And though the Judgment given were erroneous, and for that cause reversible, yet standing in force unrevers'd; It is a good Barr to the Plaintiffs Action.

But

But lest this should countenance Judges abating the Writ ex officio, in such Actions brought, or Plaintiffs to bring Error upon Judgments given in such Actions, I conceive the Law is clear, That Judges ought not, ex officio, to abate such Writ, nor otherwise than when the Executor or Administrator, Defendant in such Action demurs, and demands Judgment of the Writ, and that Judgment given against such Defendants not demurring to the Writ, is not Erroneous, unless for other cause.

If it be urg'd further, That though a Judgment obtain'd upon a simple Contract, be a barr to an Action of Debt brought after upon an Obligation, or to an Action of the Case upon an Assumpsit to pay money, as the present Case is.

Yet it should not barr, if the Action upon which it was obtain'd, were commenc'd pending a former Action upon an Obligation, or upon an Assumpsit for money, in which the Intestate could not have waged his Law.

The answer is as before, such Judgment bars until revers'd, if admitted to be reversible; as it is not.

But the Law is settled, That wheresoever an Action of Debt, upon Bond or Contract, is brought against a man, he may lawfully confess the Action, and give way to a Judgment, if there be no fraud in the Case, although he have perfect notice of such former Suit depending; nor is there any restraint or limit of time for confessing an Action brought upon a simple Contract, more than upon a Bond.

And to satisfy any Debt upon Obligation, before a Judgment so obtain'd, is a Devastavit in the Executor or Administrator, and so it is to satisfy any latter Judgment, if there be not assets to satisfy the first also. So are the express Books; to those points of 5 H. 7. per Curiam: and Scarles his Case in Moore and Green, and Wilcock's Case in Crook. Eliz.

5 H. 7. f. 27. b.  
Moore, Scarles  
Case, f. 678.  
Crook 38 El.  
f. 462.  
Green & Wil-  
cock's Case,

Yet in 25 Eliz. when an Action of Debt for 100 l. was brought against an Executor in C. B. and pending that, Debt was brought against him in B. R. for 100 l. which latter he confess'd, and the Judgment there had, pleaded in Barr to the first Action.

And upon Question if the Plea were good, Fenner and Walmesley held it good, but Anderson, Mead, Wyndham, and Periam argued to the contrary, and that he ought to have pleaded the first Action pending to the second Action brought. The Arguments of both sides you may see in Moore, f. 173. where it is left a Quere, the Judges doubting the Case; but since the Law is taken, That the Judgment is a good barr to the first Action.

Moore, 25 El.  
f. 173.

It will be still objected, That if the Law be that Executors or Administrators may pay debts upon simple Contracts of the deceased, to which they are not bound, and thereby prevent the payment of a debt to which they are bound; It is repugnant to Reason, and consequently cannot be Law; for that is in effect, at the same time to be bound, and not bound to pay: For he who may not pay being bound, is not bound at all. For clearing this we must know,

Though Executors or Administrators are not compelled by the Common Law to answer Actions of Debt for simple Contracts, yet the Law of the Land obligeth payment of them. For,

1. Upon committing Administration, Oath is taken to administer the Estate of the dead duly, which cannot be without paying his debts.

2. Oath is taken to make true account of the Administration to the Ordinary, and of what remains, after all Debts, Funeral Charges, and just Expences of every sort deducted.

3. This appears also by the Statute of 31 E. 3. c. 11. That Administrators are to administer and dispend for the Soul of the Dead; and to answer to others to whom the dead persons were holden and bound, which they cannot better do, than by paying their debts.

And as this was the ancient Law and practice before in the Spiritual Court, so by the new Act in 22 and 23 of the King, for the better settling of Intestates Estates, It is enacted accordingly, that upon the Administrators account, deductions be made of all sorts of debts.

This appears to be the ancient Law by the Great Charter, c. 18. and long before by Glanvill in Henry the Second's time, and Bracton in Henry the Third's time.

4. And by Fitz-herbert in the Writ de rationabili parte bonorum, the debts are to be deducted before division to the wife and children. And upon the Executors account all the Testators debts are to be allow'd before payment of Legacies, which were unjust, if the payment of them were not due, as appears by Doctor and Student.

Executors be bound to pay Debts before Legacies by the Law of Reason, and by the Law of God; for Reason wills that they should do first that is best for the Testator, that is, to pay debts, which he was bound to pay before Legacies, which he was not bound to give.

2. It is better for the Testator, his Debts should be paid, for not payment of which his Soul shall suffer pain, but none for not performing his Legacy.

Doct. & Stud.  
l. 2. c. 11.

The Ordinary upon the account, in all the Cases before rehears'd, will regard much what is best for the Testator. And I conceive the Ordinary may enforce the payment of Debts upon Contracts, as well as Legacies of Marriage money, and no Prohibition lies.

L. 2. c. 10. f. 139

An Executor or Administrator may retain for his own satisfaction a Debt by single Contract, due from the Testator or Intestate, which he could not do, unless the payment were lawful.

If at the Common Law, the Executors payments of Debts, upon simple Contracts were not just, why have the Judges, in all Ages, given Judgment for the Plaintiffs, unless the Defendant either Demurs in the Commencement of the Plea, or avoids the Debt by special matter pleaded, and put in issue; but he shall never, in such case, either Arrest the Judgment, or bring Error after Judgment for that Cause.

And so it is agreed for Law in Read and Norwoods Case in Plowden, where the Judges had view of numerous Judgments in that kind, as there appears.

And if such Debts were not justly to be so demanded and paid, it had been against the Judges Oath to pass such Judgments; for the Defendant is not bound to Demur, but leaves the Justice of the Plaintiffs demand to the Court.

In Decimo H. 6. Cotesmore, who gave the Rule in the Case in question, hath these words; The Law will not charge Executors with a duty due by a simple Contract made by the Testator. Then if such Action be brought against Executors upon a simple Contract made by the Testator, and they will not take advantage at the beginning of the Pleas in abatement of the Writ, but plead other matter which is found against them, they never shall have advantage to shew that before Judgment (that is in Arrest of Judgment) and that I have known adjudg'd in this place once before this time.

10 H. 6. f. 24 b.  
25. a.

Here is not only his own Opinion, but a Judgment by him cited in that Court formerly in the point.

I shall add another Case to this purpose. A man brought a Writ of Debt against another, and counted that he sold certain Goods to his Testator for the Sum in demand. Littleton caus'd the Attorney of the Plaintiff (as printed) but should be Defendant, to be demanded, and so he was; and Littleton demanded of

15 E. 4. f. 24. a.



of him, Si'l voyl avoyder son Suite, not his own, but his who counted against him que dit que voyl, and after Littleton said to the Attorney of the Plaintiff, The Court awards, that you take nothing by the Writ; for know, that a man shall never have an Action against Executors, where the Testator might have wag'd his Law, in his life time, quod nota.

It was not proper to ask the Plaintiffs Attorney, Whether he would avoid his Clyents Suit, and an unlikely answer of his to say, Yes; but a rational demand to the Defendants Attorney, Whether he would avoid his Suit who counted against him? and probably he should answer Yes; and after Littleton said to the Attorney of the Plaintiff, the Court awards you take nothing by your Writ: If he had been the person to whom the question was first asked, and who immediately before had answer'd, Yes; the Book had not been that after Littleton said to the Attorney of the Plaintiff, but that Littleton said to him who was the same he discours'd with.

The Print thus rectified, this Case agrees with the Law deliver'd by Coismore. An Executor is sued, and declared against in Court, for so was the Course then, upon a simple Contract of his Testators, the Judge asks his Attorney, Whether he had a mind to avoid the Suit? who answer'd, Yes. If the Judge had thought fit, he might have avoided the Suit without making any question, but knowing it was not consonant to Law to avoid a Suit upon a simple Contract, unless the Executor himself desired it; He therefore asked him the Question, and finding he did desire it; the Judge presently told the Plaintiffs Attorney, He could take nothing by the Writ. Else you see the Consequence of this Judgment, That the Judges, ex officio, should prevent any Judgment for the Plaintiff in Debt, brought upon a simple Contract against an Executor, whether the Executor would or not, against former and subsequent usage.

Brook in Abridging this Case, and not reflecting upon it rightly, absolves it, that Littleton demanded the Plaintiffs Attorney, If he would avoid his Suit; whereas the word is clearly avoid, not avow: and to what purpose should he ask that Question; for sure it was avoid'd as much as could be, when counted upon at the instant in Court.

Then

Then Brook makes a Note, Nota cest Judgment ex officio. Br. Executor pl. 80.

And this Note of Brooks misled the Lord Anderson once to the same mistake, if the Report be right; but the like hath not been before or since. An Action was brought against an Administrator upon a Contract of the Intestates, who pleaded fully administered, and found against him. Anderson said that ex officio, the Court was to stay Judgment, and did so, because the Administrator was not chargeable upon a simple Contract. Rob. Hughson's Case. Gouldsbroughs Rep. 30 Eliz. f. 106. & 107.

But since that Case of Hughson, one Germaine brought an action of Debt against Rolls, as Executor of Norwood, for Fees, as an Attorney in the Common Bench, and for soliciting in the Queens Bench, and for money expended about a Fine for Alienation. Rolls pleaded Ne unque Executor, which was found against him, and Judgment given: Upon which Rolls brought a Writ of Error, and the Error assign'd was, That the Action lay not against an Executor, because the Testator could have waged his Law. But it was resolv'd, That for Attorney's Fees, the Testator could not wage his Law, but for the rest he might; and that the Executor might have demurr'd at first, but pleading a Plea found against him, it was said he was Concluded; some difference of Opinion was, Germane versus Rolls, 37 & 38 El. Cru. 415. pl. 24.

But agreed, That the Executor confessing the Action or pleading, nil debet, in such Case, and that found against him, he hath no remedy.

And Popham remembred Hughson's Case in the Common Pleas, and would see the Roll, for he doubted, that both in that Case, and this of Germaine, the Executor had not confessed the Debt in effect.

But after it was mov'd again, and all the Judges, but Gwydy, were of Opinion that the Judgment was well given, as to that Cause; but it was revers'd for a Cause not formerly mov'd, which was, Hill. 38 Eliz. Cru. 459. pl. 4.

That an Action of Debt would not have layn against the Testator himself for part of the money in demand and recovered; that is, for the money for soliciting, which was not a certain Debt, but to be recovered by Action on the Case.

Some Cases in the Old Books may seem to colour this Opinion, That the Judges, ex officio, in an Action of Debt brought against an Executor or Administrator for a simple Contract of the Testators or Intestate, ought to abate the Writ.

25 E. 3. f. 40. The first is 25 E. 3. f. 40. where an Action was brought against an Executor upon a Tally struck by the Testator. The Judges said, Nil Capiat per breve, if he have no better Specialty.

12 H. 4. f. 23. The like Case is 12 H. 4. f. 23. where a like Action was brought against the Executor or Administrator upon a Tally of the Testators, and there it appears the Defendants Council would have demurr'd, and the Cause is mentioned, That the writing of the Tally might be washed out by water, and a new put in the place, and the Notches chang'd, and the Judgment was Nil capiat per breve.

This being the same Case with the former, the reason of the Judgment was the same of grounding an Action upon a Specialty not good in Law.

Besides, it appears in the latter Case, the Executor opposed the Action by offering to demurr, and for any thing appearing, he did so in the first.

41 E. 3. f. 13. The other Case is 41 E. 3. f. 13. where an Action upon the Testators simple Contract was brought against an Executor, and the Executor of a Co-executor to him, the Writ was abated for that Reason, and said withal, There was no Specialty shewed but the first reason abating the Writ necessarily, it no ways appears the Judges would, ex officio, have abated the Action for the last Cause, if the Executor desired it not.

So as when the Executor or Administrator hath once pleaded to an Action of Debt, upon a single Contract, he is equally bound up for the event, as in any Action wherein the Testator or Intestate could not have waged Law.

It is therefore an ill Consequence for the Plaintiff to say, I have brought an Action upon a simple Contract, wherein the Intestate could not have waged his Law.

Therefore I must be paid before another Creditor, by simple Contract, bringing an Action wherein the Intestate might wage his Law, for it is in the Administrators power, by omitting to abate the Writ at first, to make the Debt demanded by Action in which the Intestate might have waged his Law, to be as necessarily and coercively paid, as the other Debt demanded by Action, wherein he could not wage his Law.

And if the Executor believes the Debt by simple Contract demanded by Action of Debt to be a just Debt, it is against honesty, conscience, and the duty of his Office to demurr, whereby to delay, or prevent the payment of it.

Besides

Besides, though since that illegal Resolution of Slade's Case, grounded upon Reasons not fit for a Declamation, much less for a Decision of Law,

The natural and genuine Action of Debt, upon a simple Contract, be turned into an Action of the Case, wherein a man is deprived of waging his Law; It is an absurd Opinion, to think that therefore Debt demanded by it, ought to have pre- cedency for payment of a Debt due by simple Contract, but quite the contrary.

For Actions of the Case are all *Actiones injuriarum*, & contra pacem, and it is not a Debt certain, in reason of Law, that can be recovered by those Actions, but damage for the injury ensuing upon the breach of promise, which cannot be known until a Jury ascertain what the damage is: There- fore a man did never wage his Law for a demand incertain, for he could not make Oath of paying that, which he knew not what it was, as consisting in damage.

Now although the Jury give in damages regularly, the money promised to be paid, yet that changeth not the reason of the Law, nor the form, for still it is recovered by way of damage, and not as a Debt is recovered.

Which shew the Action much inferiour and ignobler than the Action of Debt, which by the Register is an Action of property, and no reason a damage uncertain in its own nature should be paid before a certain Debt by simple Con- tract, which were the first Debts, and will probably be the last of the World, for Contracts by writing were much later; and there are many Nations yet, where Letters are unknown, and perhaps ever will be.

And that which is so commonly now received, That every Contract executory implies a promise, is a false Gloss, there- by to turn Actions of Debt into Actions on the Case: For Contracts of Debt are reciprocal Grants. A man may sell his black Horse for present money, at a day to come, and the Buyer may, the Day being come, seize the Horse, for he hath property then in him, which is the reason in the Register, that Actions in the Debt, and also in the Detinet, are Actions of Property; but no man hath property by a breach of promise but must be repaid in damages.



The last Exception was, That a Recognizance in the nature of a Statute Staple of 2000 l. in the Chancery, is pleaded in Barr.

And it is not said, That it was per scriptum Obligatorium, or seal'd, as the Statute of 23 H. 8. requires, nor that it was secundum formam Statuti.

Cr. 10 Car. 1.  
f. 362. Gold-  
smiths Case,  
versus Syd-  
nor.

And Goldsmith and Sydnors Case was urg'd to be adjudg'd in the point, which Case is so adjudg'd by the Major part of the Court.

But in that Case it is pleaded, that Sydnor, before the Chief Justice of the Common Pleas, concessit se teneri Ed. Hobert in 400 l. to be paid at Pentecost next ensuing, & si defecerit, &c. voluit & concessit per idem scriptum quod incurreret super se hæredes & Executores poena in Statuto Stapule.

So as it appears, The Recognizance was taken before the Chief Justice of the Common Pleas, and that the Conuzor was to incur the penalty of the Statute Staple, and therefore a Recognizance in the nature of a Statute Staple, was there intended to be pleaded, but it was not pleaded that it was taken secundum formam Statuti in general, nor specially per scriptum Obligatorium under Seal, as it ought to be.

But here it is not pleaded, That the Conuzor was to incur the penalty of the Statute Staple; nor that it was taken before any person authorized to take a Recognizance in the nature of a Statute Staple, by the Statute of 23 H. 8. c. 6. for the Chancellor is not so authorized.

But that it was a bare Recognizance entred into in the Court of Chancery, which all Courts of Westminster have power to take, and that it remains there intoll'd. And that the said Sum of Two thousand pounds should, for default of payment, be levied of the Conuzors Lands, Goods, and Chattels, and Execution of such Recognizances are to be made by Elegit of the Lands as well as Goods.

And it appears by the Statute of Adon Burnell 13 E. 1. which is the Law for the Statute Merchant, That such Recognizances for Debt were before the Statute Merchants taken by the Chancellor, the Chief Justices, and Judges Itinerant, but the Execution of them not the same as of the Statute Merchant, nor are they hindered by that Statute from being as before expressly.

And

And in 4 Mariz, upon a great search of Presidents, It was resolv'd, That every Judge may take a Recognizance in any part of England, both in Term and out of Term.

Br. Recognizance p. 20.  
Hill. 4 Mar.

The like Resolution was in the Lord Hobart's time.

Hob. f. 195.  
Hall & Wingfields Case.

So as the Recognizance here pleaded, is not a Recognizance in the nature of a Statute Staple, nor so pleaded, but a Recognizance entered into in the Court of Chancery, as Recognizances are entered into in the Court of Common Pleas, or Kings Bench, and as they were entered before Recognizances by Statute Merchant or Staple. But

Such Recognizances are to be satisfied before Debts by simple Contracts, and before Debts by Obligations also, which avails the Exception.

Rolls, Executors f. 925.  
14 Jac. B.R.  
Robson and Francis Case.

Now as to the Second Question.

Admitting the Judgment in London as pleaded, be no sufficient barr of the Plaintiffs Action; or if it be, that the Recognizance as pleaded, is no sufficient barr: For if those will barr, there is no further Question.

If then, Judgment ought to be for the Plaintiff, upon the Defendants Plea to the whole matter? And I conceive it ought not.

I shall agree, That if the Defendant plead several Judgments against the Intestate, or himself as Administrator, and Statutes entered into by the Intestate, and concludes his Plea, That he hath not, nor at any time had, assets in his hand of the Intestates Estate, præterquam bona & catalla sufficient, to satisfy those Judgments and Statutes, and avers they are unsatisfied, and which assets are chargeable with the said Judgments and Statutes, that this is a good Plea in barr of the Plaintiffs Action, and so it is admitted to be in Meriel Treshams Case; and the Plaintiff must reply, That he hath assets ultra, what will satisfy those Judgments and Statutes, as is there agreed.

Meriel Treshams Case,  
9. Rep.

But if the Plaintiff reply, That any one of those Judgments was satisfied by the Intestate in his life time, saying nothing to any of the rest. And the Defendant demurr upon this Replication, the Plaintiff must have Judgment, for the Plea was false, and the falsehood detrimental to the Plaintiff, and beneficial to the Defendant; for having pleaded, he had no more assets than would satisfy those Judgments, one of them being satisfied before, he hath confessed there is more assets than will satisfy the other Judgments, by as much as the Judgment already satisfied amounts unto, which would turn to his gain, and the Plaintiffs loss, if his demurrer were good.

Turners Case  
8. Rep.

But to plead, That he hath not bona & cattalla præterquam bona quæ non attingunt, to satisfie the said Judgments and Statutes is not good for the Incertainty; for if the Judgments and Statutes amount to 500 l. 20 l. are bona quæ non attingunt, to satisfie them; so is 40 l. so is 100 l. so is 200 l. and every Sum less than will satisfie; so as by such Plea there is no certain Issue for the Jury to enquire, nor no certain Sum confess'd towards the payment of any Debt, as is well resolv'd in Turners Case.

So if a man pleads he hath not assets ultra, what will satisfie those Judgments, the Plea is bad for the same reason, for 40 l. is not assets ultra, that will satisfie them, nor 40. nor 100. nor 200. nor doth that manner of pleading confess he hath assets enough to satisfie: As to say, I have not in my pocket above 40 l. is not to say, I have in my pocket 40 l.

But in this Case, the Defendant hath pleaded payment of several Bonds, Bills, and Judgments, and pleads one Recognizance of 2000 l. and one Judgment of 7000 l. wholly unsatisfied, and concludes his Plea with *plene administravit*.

And that he had not, *die impetrationis brevis, nec unquam postea aliqua bona seu cattalla*, of the Intestates, in manibus suis administranda præterquam bona & catalla, ad valentiam separalium denariorum summarum per ipsum, sic ut præfertur solutarum, in discharge of the said several Judgments, Bonds, and Bills.

Et præterquam alia bona & catalla ad valentiam decem solidorum quæ executioni recognitionis prædict. & judicii prædict. per præfat. Car. Cornwallis recuperat. onerabilia existunt.

Now upon this Plea, if Allington's Judgment of 2670 l. or the Statute of 2000 l. or both, be avoided, yet the Plaintiff hath no right to be paid, until the Judgment of 7000 l. be so satisfied, and that some assets remain after the satisfaction of it in the Administrators hands, for before the Plaintiff hath no wrong, nor the Administrator doth none, nor hath any benefit by not satisfying the Plaintiff.

That spongy Reason that the Defendants Plea is all intire, and therefore if any part be false, as either in that of Allington's Judgment, or the Recognizance, the Plea is bad, is not sense; for if the falshood be neither hurtful to the Plaintiff, nor beneficial to the Defendant; why should the Plaintiff have what he ought not, or the Defendant pay what he ought not.

Suppose the Defendant pleaded a Judgment obtain'd against the Intestate, or himself, and that the Intestate or himself were married at the time of the Judgment obtain'd (which in truth was

was false, for that the one or the other was unmarried at that time) his Plea being otherwise good; Should this falseness cause the Plaintiff to recover? surely no, for the falseness is not material, nor any way hurtful to the Plaintiff.

Besides, the usual pleading, as appears both by *Turners* and *Treshams* Case, is that the Plaintiff must avoid all payments pleaded in barr, until some assets appear in the Administrators hands remaining, and then he is to have Judgment.

Much noise hath been about this Case, and without Reason, as I suppose, though there were no precedent Judgment in the point, but there is a Judgment per Curiam.

An Action of Debt was brought against Executors, who pleaded a former Recovery against them of 200 l. and Execution issued, and pleaded likewise another Recovery against them of 100 l. and travers'd, that they had no assets but to satisfy that Execution of 200 l. the Plea was adjudged good by the Court, and that the Plaintiff must reply, They had assets in their hands, ultra the said 200 l. and ultra the said 100 l. for before the 100 l. were also satisfied the Plaintiff was not intitled to his Debt, as the Book is.

9 E.4.12.b



*Hill. 18 & 19 Car. II. C. B.*

*Thomas Price* is Plaintiff, against *Richard Brabam, Elizabeth White, Elianor Wakeman, and Richard Hill* Defendants, In an Action of *Trespasse* and *Ejectionment*.

**T**HE Plaintiff declares, That one Henry Alderidge, the First of November, 18 Car. 2. at the Parish of St. Margarets Westminster, demis'd to the Plaintiff and his Assigns, an Acre of Land, with the Appurtenances, in the Parish of St. Margarets aforesaid.

Habendum from the Thirtieth of October then last past, for the term of Five years next ensuing; by virtue whereof he entered, and was possessed, untill the Defendants afterwards, the same day entered upon him; and did Eject him, to his damage of 20 l.

To this the Defendants pleaded, That they are not Culpable.

Special Verdict is found. By which it is found, That the Defendants are not Culpable of Entry and Ejectionment in the said Acre, excepting a piece thereof, containing One hundred and Eighty Foot thereof in length, and Eight and twenty Foot in breadth.

And as to that piece they find, that the same, time out of mind, was a Pool, until within Twenty years last past, during which Twenty years it became fill'd with Mudd.

They find, That before the Trespass supposed, that is, the First of August, 1606. King James was seiz'd, in right of the Crown, of the said Pool, and three Gardens, with the Appurtenances, in St. Margarets aforesaid, in his Demesne as of Fee.

They find again, That the same First Day of August, 1606. A Water-work was built in the said Gardens, and the said Pool was thence us'd, with the said Water-work, until the Twelfth Day of March, in the Eleventh year of King James.

That

That King James so leis'd, the said Twelfth of March, by his Letters Patents under the Great Seal of England, bearing Date the said Twelfth of May, 11 Jac. in consideration of 70 l. 10 s. of lawful money of England, paid by Richard Prudde, and for other considerations him moving, at the nomination and request of the said Richard. Et de gratia sua speciali, ex certa scientia & mero motu for him, his Heirs and Successors, granted to the said Richard Prudde and one Toby Mathews, Gent. and to their Heirs and Assigns; among other things the said Three Gardens and Water-works thereupon erected, to convey water from the River of Thames to divers houses and places in Westminster, and elsewhere, with all and singular the Rights, Members, and Appurtenances, of what nature and kind soever.

They further find, That the said King James, by his said Letters Patents, for the consideration aforesaid, for him, his Heirs and Successors, granted to the said Richard Prudde and Toby Mathew, their Heirs and Assigns (inter alia) Omnia & singula stagna, gurgites aquas, aquarum cursus, aqueductus, to the said Premises, granted by the said Letters Patents, or to any of them, or to any parcel of them, quoquo modo spectantia, pertinentia, incidentia, vel appendentia, or being as member, part, or parcel thereof, at any time thenceforth had, known, accepted, occupied, used, or reputed, or being together with the same, or as part, parcel, or member thereof, in account or charge, with any of his Officers, as fully and amply as the same were formerly held by any Grant or Charter, Ac adeo plene libere & integre, ac in tam amplis modo & forma, prout idem nuper Rex aut aliquis progenitorum sive predecessorum suorum premissa prædicta. per easdem Litteras Patent. præ-concessit & quamlibet seu aliquam inde partem, sive parcelam habuerunt, habuissent, vel gavisii fuissent, & habuissent vel habere uiri & gaudere debuissent aut debuit.

They further find, That the said Pool was necessary for the Water-works aforesaid, and that it could not work without the said Pool.

They further find, That the King, who now is, by his Letters Patents dated at Westminster the Fifteenth of February, the Eighteenth of his Reign enroll'd in the Exchequer, in consideration that Henry Alderidge Gent. a piece of Land, and other the Premises granted by the said Letters Patents, cover'd with water and hurtful mudd, would fill up at his proper charges, and perform the Covenants and Agreements in the Letters Patents contain'd, for him, his Heirs and Successors, granted the

the aforesaid piece of Land, containing as aforesaid in length and breadth, by the name of All that piece of Land or broad Ditch, lying and being in the Parish of St. Margarets Westminster, with particular Boundaries thereto expressed,

To have and to hold from the Feast of the Annunciation last past, for the term of One and twenty years thence next ensuing.

They find, That the said Henry Alderidge entered into the Premises, then in the possession of the Defendants, and so possess'd, made the Lease to the Plaintiff, Habendum to him and his Assigns, as in the Declaration.

That the Plaintiff entered by virtue thereof into the said piece of Land, and was possess'd, till the Defendants Ejected him.

And if upon the whole matter, the Defendants be Culpable, they assess damages to 12 d. and costs to 40 s. And if they be not, they find them not culpable.

The first Question is, What can pass by the name of Stagnum or Gorges? for if only the water, and not the soil, passeth thereby, the Question is determined, for the piece of Land containing such length and breadth, cannot then pass.

Fitzh. N.Br.  
191.b. Lett. H.

34 Aff. pl. 11.  
Coke Litt. f.  
5, 6 ad finem.

By the name of Gorges, water and soil may be demanded in a precipe.

By the name of Stagnum the soil and water is intended.

1. Where a man had granted to an Abbot, totam partem piscariae suae, from such a Limit to such a Limit, reservato mihi Stagno molendini mei. And the Abbot, for a long time after the grant, had enjoyed the fishing of the Pool. It was adjudg'd, the Reservation extended to the water and soil; but the Abbot had the fishing by reason of long usage after the Grant, which shewed the Intent.

1606. 4 Jac.

The next Question is, When the soil may pass by the word Stagnum, whether it may, as belonging and pertaining to the Water-works erected 6 Jac. and granted away with the Pool, as pertaining to it in 11 Jac. as it is found: or to the Gardens, which seems a short time, especially in the Case of the King, to gain a Reputation, as belonging and appertaining.

As to this Question, things may be said pertaining in Relation only to the extent of the Grant. As an antient Messuage being granted, with the Lands thereto appertaining, and if some Land newly occupied, and not antiently with that Messuage, shall pass as appertaining, is a proper Question; but that is a Question only of the extent of the Grant, and what was intended to pass, and not of the nature of the Grant.

Four Closes of Land, part of the possessions of the Priory of Lancelston, came to King Henry the Eighth, and after to Queen Elizabeth, usually call'd by the Name of Drocumbs, or Northdrocumbs. A House was built 21 Eliz. as the Book is, by the Farmers and Occupiers of these Closes upon part. In 24 Eliz. she granted, *Totum illud Messuagium vocat. Drocumbs, ac omnia terras & tenementa dicto messuagio spectantia in Lancelston.*

After King James made a Lease of the Four Closes call'd Northdrocumbs, or Drocumbs; and upon question between the Queens Patentee and the Kings, Judgment was given for the Queens Patentee: Because, though the House was newly erected before the Queens Grant, yet the Land shall be said belonging to it, and it shall pass by such name as it was known at the time of the Patent; and that was a stronger Case than this, there being but Three or Four years to give Reputation of belonging or appertaining.

Gennings  
versus Lake;  
3 Car. 1.  
Crook 168.

Another meaning of the words belonging or appertaining, is, when they relate not to the extent or largeness of the Grant, but to the nature of the thing granted. As if a man newly erect a Mill in structure, and hath no Water-course to it, if he grants his Mill with the Appurtenances, nothing passes but the structure. But if he, after the structure; acquire or purchase a Water-course to it, and grant it with the Appurtenances, the Water-course passes, because the Mill cannot be used without it. So it is for the Mill-damm or Bank, or the like. So if he acquire an enlargement or bettering of his Water-course, that additional water shall pass as pertaining, how late, or forever acquired.

So if a man grants his Saddle, with all things thereto belonging, Stirrops, Girths, and the like pass.

So if a man will grant his Viol, the Strings and Bow will pass.

And the Pool was belonging and appertaining to the Water-work in this last sense, as pertaining to the nature of the thing granted, without which it could not be us'd; for the Jury find,

Q

Quod



Quod Stagnum prædictum fuit necessarium pro structura (Anglicè *Water-work*) prædictæ, quodque eadem structura sine eodem Stagno operare non potuit.

And where a thing is so pertaining to the nature of the thing granted, it is belonging and pertaining immediately as soon as the thing is erected, and it is annexed to it.

And note, the Jury do not find that aqua Stagni prædictæ, but the Stagnum it self, was necessary for the *Water-work*. Nor do they find that the *Water-work* could not operate sine aqua Stagni, but sine Stagno prædictæ. And thereby they find that the *Water* and *Soyl*, which Stagnum signifies, was necessary for the work, and it could not work without it.

*Pasch. 19 Car. II.*

*Henry Stiles Plaintiff; Richard Cox* Baronet, *Richard Cox* Esquire, *John Cromwell*, *Thomas Merrett*, and *Charles Davies* Defendants; In an Action of Trespas, of Assault, Battery, and False Imprisonment.

1. **T**he Plaintiff declares, That the Defendants, the last day of December, in the Seventeenth year of the King, in the Parish of St. Mary Bow in the Ward of Cheap in London, assaulted, wounded, and kept him in Prison by the space of two days next following, to his Damage of One hundred pounds.

2. The Defendants plead, They are not Culpable of the Trespas, Assault, Battery, &c. aforesaid.

3. The Jury find Richard Cox Esquire, and Charles Davies, not Culpable accordingly.

4. And as to the rest of the Defendants they find specially, That before the suppos'd Trespas, that is, the Eight and twentieth day of September, in the Seventeenth year of the King, one Richard Baughes Esquire, one of the Judges of the Peace of the County of Gloucester, issued his Warrant under his Hand and Seal to the Constable and Tithingmen of Dumbleton in the said County, to apprehend and bring before him the Plaintiff Henry Stiles, and others, to answer to such matters of Misdemeanour, as on his Majesties behalf, should be objected against them by Sir Richard Cox Baronet, then high Sheriff of the said County.

They find the Warrant in hæc verba.

5. That the said Warrant was afterwards, and before the Trespas, delivered to one Samuel Williams, Constable of Dumbleton, to be executed, and that upon the said last day of December, mentioned in the Declaration, being Sunday, immediately before Divine Service, the Plaintiff sitting in a Seat of the said Church of Dumbleton, by order of Richard Dasney Esquire, his Master, who claimed right to the said Seat, the said Plaintiff being no Parishioner there, nor dwelling in the said Parish, the said Samuel being then Constable, arrested the said Plaintiff.

6. That the said Plaintiff at first resisted, and refused to obey the said Warrant, and after obey'd it. That the said Samuel the Constable, required the said Defendant Thomas Merret, to assist him to convey him before a Justice of the Peace. But the said Samuel, Thomas Merret, and John Cromwell, convey'd him to the House of the said Samuel in Dumbleton.

7. Et tunc, the aforesaid Richard Coxe Miles, sent for the said Samuel; at the House of the said Samuel in Dumbleton aforesaid, Et precepit eidem Samueli, to lay the Plaintiff in the Stocks, and thereupon the said Samuel, John, and Thomas, convey'd the Plaintiff fromwards the way to the said Richard Baughes Justice of the Peace, and about Eleven of the Clock of the same day in the morning, put the Plaintiff in the Stocks.

8. They find the Act of 21 Jac. particularly cap. 12. And the Recital therein of the Act of 7 Jac. cap. 5. being an Act intituled, An Act for easie pleading against troublesome and contentious Suits against Justices of the Peace, Mayors, Constables, &c.

9. And find particularly. That it was Enacted by the said Parliament, Quod si aliqua Actio, Billa, &c.

10. But whether upon the whole matter by them found, the said Sir Richard Coxe Baronet, John, and Thomas are Culpable, they know not. Et petunt advisamentum Curie in Premissis.

11. And if upon the whole matter so found, the Court shall think quod actio predicta possit commensari in London. Then they find the said Richard Coxe Baronet, John, and Thomas Culpable of the Trespass, and assess damages to One hundred Marks, and Costs to Three and fifty shillings and four pence.

12. But if the said Court be of Opinion, That the aforesaid Action could only be laid in the County of Gloucester, then they find the said Richard Coxe Baronet, John, and Thomas not Culpable.

The words of the Act of 21 Jac. cap. 12. and which are particularly found by the Jury, are

1. That if any Action, Bill, Complaint, or Suit upon the Case, Trespass, Beating, or False Imprisonment, shall be brought against any Justice of the Peace, Mayor, or Bayliff of City, or Town Corporate, Headborough, Portreeve, Constable, Tithingman, &c. or any of them, or any other, which in their Aid or Assistance,

stance, or by their Commandment, shall do any thing touching or concerning his or their Office or Offices, for or concerning any matter, cause, or thing, by them or any of them, done by virtue or reason of their, or any of their Office or Offices. That the said Action, Bill, Plaint, or Suit, shall be laid within the County where the Trespass or Fact shall be done and committed, and not elsewhere.

2. And that it shall be lawful to every person and persons aforesaid, to plead the general Issue, and to give the special matter in evidence. As by the Act of 7 Jac. cap. 5.

3. That if upon the Tryal of any such Action, Bill, Plaint, or Suit, the Plaintiff therein shall not prove to the Jury, Trespass, Beating, Imprisonment, or other Fact or cause of Action, Bill, Plaint, &c. was or were had, made, or committed within the County wherein such Action, Bill, Plaint, or Suit, shall be laid, That then the Jury shall find the Defendant or Defendants, in every such Action, Bill, Plaint, or Suit, Not guilty, without having any regard or respect to any Evidence given by the Plaintiff touching the Trespass, or other cause of the Action, Bill, Plaint or Suit, &c.

4. If Verdict shall pass with the Defendant or Defendants, or if the Plaintiff therein become Non-suit, or suffer any discontinuance thereof, the Defendant or Defendants, shall have such double Costs and other Advantages, as by the Act of 7 Jac. cap. 5. is provided.

**The first Question upon this Special Verdict, is**

Whether if any Officer in the Act mentioned, or any in his assistance, shall do things, by colour of their Office, not touching or concerning their said Office, and shall be therefore impleaded? Or if they, or any of them shall be impleaded for or concerning any matter, cause, or thing by them, or any of them, done by pretence of their Offices, and which is not strictly done by virtue or reason of their Office, but is a misfeasance in Law, shall have the benefit of this Act, of having the matter tried in the County where the Fact was done, and not elsewhere?

**If so,**

1. They shall not have the Tryal for any matter touching their Offices in the County where the Fact was done, unless the Plaintiff



Plaintiff please to lay it there, and if he so pleas'd, it might have been laid there before the Act of 21. which was purposely made to compel the laying of the Action where the Fact was done.

2. By such Exposition of the Act, the Action shall never be laid where the Fact was done; for if it may be laid elsewhere at all, if it be found upon the Tryal, That the Officers question'd did not according to their Office, there will be no cause to lay the Action in the proper County; for the Jury where the Action is laid, will find for the Plaintiff for the Misdemeanor; and if it be found the Defendants have pursued their Office, wherever the Action is laid, the Jury will find for the Defendants, and then no cause to lay an Action in the County where the Fact was done; So Quacunqve via data, the Act will be useless.

3. If it can be laid in another County, without hearing Evidence, it cannot be known whether the Officer hath misdone, or not. How then can the Jury (as the Act directs) find the Defendants Not guilty, without regard or respect to the Plaintiffs Evidence; for then the Jury must regard the Evidence, to find whether the Officer hath misdone, and not regard the Evidence at all, to find the Officers Not guilty, as the Act doth order.

Now is there any inconvenience, because by the Intention of Law, whether the Officers have done justifiably, or not, without this Act of 21. the Action ought to be laid where the Fact was done; and the Act is but to compel the doing of that where an Officer is concerned, that otherwise fieri debuit, though factum valet not being done.

The second Question is, Whether upon the special points referred to the Court by the Jury, they have found all the Defendants, or any of them, and whom, Not guilty?

It hath been admitted at the Barr, That the Defendants, excepting Sir Richard Coxe, cannot be found culpable by this Act of 21. and it being a Trespass, that some may be guilty, and not others; which is true.

But the Question is not, Whether some of the Defendants might have been found guilty, and others not? but whether, as this Verdict is, all or none must be Culpable.

1. The Jury refer to the Court, Si actio prædicta potuit commensari in London, then they find all the Defendants culpable. And if actio prædicta potuit commensari tantummodo in the County of Gloucester, then they find all the Defendants by name, Not Culpable.

So

So as the matter is, Whether this individual Action brought jointly against all the Defendants, might be laid in London? For that is the *Actio prædicta*, not whether an Action might be laid in London for the Trespass against any of these Defendants? and in that first sense, *Actio prædicta*, could not be in London; for it could not be there laid, as to some of the Defendants.

2. Secondly, they refer to the Court, Whether *Actio prædicta*, which is this Action, jointly brought against all the Defendants, could only be laid in the County of Gloucester; and if so, they find for the Defendants; to which the Court must answer, That this Action, so jointly brought, could only be laid according to Law, *ad omnem Juris effectum*, in the County of Gloucester.

3. Thirdly, if the Court should be of Opinion, That the Action was well laid, as to Sir Richard Coxe, but not the rest, the Jury find not him Guilty, and not the rest; for they find all equally Guilty, or equally not Guilty.

4. Fourthly, That which differs his Case from the rest, is, That he was not assistant or aiding to the Constable; for he had, that is, *præcepit*, or commanded the Constable to put the Plaintiff in Cippis.

But as to that, the ancient Law was both adjudg'd in Parliament, and allowed, That it was *contra consuetudinem Regni*, that a man should be condemn'd in a Trespass, *De præcepto* or *auxilio*, if no man were convicted of the Fact done.

It was the Case in Parliament of Bogo de Clare, 18 E. 1. John Wallis Clerk, entered his House, and brought Letters of Citation from the Arch-bishop of Canterbury: Some of the Family of Bogo made Wallis eat the said Process and Wax there-to affixed, *Et imprisonaverunt & male tractaverunt*: For which, and the Contempt to the King, he brought his Action against Bogo; who pleaded, That he named no persons in certain, nor allidg'd that the Fact was done by his command, and demand- ed Judgment thereupon, and was discharged.

Notwithstanding, by the Kings pleasure, for so enormous a Trespass, done in Contempt of the Church, for the Contempt done within the Clerge, and in time of Parliament, and for the bad Example,

Bogo was commanded to answer the King of the Trespass done in his House, *Et per Manupastros & Familiares suos*; and a day given him to produce before the King and his Council, those of his Family: which was accordingly done, but they who were said to have done the Fact, were dead.

Et

Et super hoc idem *Bogo* petit Judicium, si de Præcepto, missione vel assensu, si sibi imponeretur ad sedam Domini Regis respondere debeat, antequam factores principales, aliquo modo de facto illo convincantur. *Whereupon Judgment was given.* Et quia per consuetudinem & legem *Angliæ*, Nullus de præcepto vi & auxilio aut missione respondere debeat antequam factores aliquo modo convincantur; Consideratum est quod prædictus *Bogo* ad præsens eat inde sine die, & prædictus *Jo. le Wallis* sequatur versus factores principales prout sibi viderit expediri si voluerit, & sit persons manuceperunt prædictum *Bogonem* ad habendum ipsum coram Domino Rege ad respondendum ipsi Domino Regi ad voluntatem suam, cum prædicti factores de facto illo fuerint convicti, si Dominus Rex versus eum inde loqui voluerit.

A Judgment in Parliament, at the Kings Suit, That it was against the Custome and Law of the Kingdom, to convict a man, de præcepto, auxilio, aut missione, in a Trespass, before some, who did the principal Trespass, were convicted.

And the reason of that Law is very pressing, for else a man may be found Culpable of aiding or precepting a Trespass to be done, when the doers of the Trespass are acquitted, and not Culpable, which is to be Culpable of aiding the doing of a thing never done, which is impossible.

It will be said, The Law in that Case is since alter'd, and otherwise practis'd. But who could alter a Law affirm'd by Judgment in Parliament, to be the Custome and Law of the Kingdom, without an Act of Parliament to alter it, which was not; or at least an Error in another Parliament, if that might be, which is not so clear.

For this is not like a Judgment given in one Court, and after contrariet in another, or in the Chequer Chamber. Any Law of the Kingdom might as well be alter'd without Act of Parliament, as this:

5. However letting that pass; but as the Law is now taken, no man can be guilty of aid or assistance to a Trespass not done, and which is the same whereof the Actors are acquitted.

But in this Case, They that put the Plaintiff in the Stocks are found not Guilty, and another Defendant found Guilty for bidding him be put in the Stocks.

6. Another reason is, That Coxe cannot be Culpable of a Trespass, which cannot, or must not be proved (which is the same) But by the Statute no regard or respect is to be had of the Evidence proving the Trespass, if the Fact be not proved to be done where the Action is laid: Therefore there can be no Evidence

Evidence against Cox̄e, for Evidence not to be regarded, and not at all, is the same.

7. If the other Defendants cannot by the Statute be found Culpable, because they were aiding and assisting the Constable, though in an undue execution of his Office, no more can Cox̄e: For aid & assistance may be by direction or precept, as well as by corporal strength: And therefore, if they be free for assisting to put the Plaintiff in the Stocks forcibly, Cox̄e is free for advising and bidding him be put there directionally.

8. Lastly, the Statute intends like benefit to the Defendants, when the Fact is not proved to be done where the Action is laid; as if the Plaintiff became Nonsuit, or suffer'd a discontinuance. But in case of Nonsuit or Discontinuance, all the Defendants were to have their double Costs both by 7 and 21 Jac. for a Nonsuit or Discontinuance cannot be against some of the Defendants, for the Nonsuit and Discontinuance are of the entire action. Therefore here all the Defendants shall have double Costs.

And if the Jury had not meant the Defendants equally free, or equally faulty, they would have added in their Verdict, That if upon the whole matter found, the Court should think that Actio prædicta would lye in London against some of the Defendants, and not others, then they found such against whom it might be laid in London Culpable, and the rest not Culpable.

The Record is, Et prædictus Richardus Cox̄e Miles, accersiv̄ Except. the Constable, whereas there is no prædictus Richardus Cox̄e Miles, but Baronettus; and there is another prædictus Richardus Cox̄e Armiger, which makes the Verdict uncertain in this point.

Quærens nil Capiat, &c.

R

Passch.



*Pasch. 21 Car. II. in Banc.*

*William Hayes Plaintiff, and Charles Bickerstaff Defendant, In Arrest of Judgment.*

**C**harles Bickerstaff being possessed of a long term of years in certain Woodlands and Copces in Cobham, in the County of Kent, Demis'd, Sett, and to Farm lett the same for Six years, parcel of his term to the Plaintiff, under a Rent and other Reservations, and Covenanted; The Plaintiff keeping and performing the Agreements of his part to be kept and performed.

Quod prædictus *Willielmus Hayes* legitime haberet, teneret, & gauderet, & habere, tenere, & gaudere, potuisset prædicta, dimissa, præmissa juxta conventionem præantea; in & per Indenturam prædict. dimiss. absque aliquo impedimento, perturbatione, evizione, vel interruptione quibuscunque de vel per dictum *Carolus Bickerstaff* Executores, Administratores, vel Assignatos suos, aut aliquem eorum prout per Indenturam prædictam plenius apparet.

That by virtue of the said Demise he entred, and was possess'd, and that after, the Defendant being possess'd for a longer term, granted the Reversion to Charles Duke of Lenox, to whom the Plaintiff atturn'd; and that afterwards the said Duke, and others by his command, entred upon the Plaintiff, although he observ'd all Agreements of his part, and carried away many Loads of Faggots and Wood, and kept; and still keeps him out of Possession, to his Damage of Eight hundred pounds.

And brings his Action for breach of the Covenant aforesaid.

The Defendant pleads Enjoyment according to the Demise, and Traverseth the Grant of the Reversion to the Duke, Modo & Forma.

All Covenants between a Lessor and his Lessee, are either Covenants in Law, or Express Covenants.

By Covenant in Law, the Lessee is to enjoy his Lease against the lawful Entry, Eviction, or Interruption of any man, but not against tortious Entries, Evictions, or Interruptions, and

and the reason of Law is solid and clear, because against tortious acts the Lessee hath proper Remedy against the wrong doer.

So are the express Books of 22 H. 6. where a man leas'd by Deed-poll without express Covenant, and 32 H. 6. where the Lease was by Deed Indented.

22 H. 6. f. 51. b.  
32 H. 6. f. 32 b.  
N. Br. 145. b.  
Letter L.  
Nat. Br.

If the Lessor leaseth the term by Deed-poll, and outeth the Lessee, he shall have a Writ of Covenant upon that Deed-poll, although he hath no Indenture of it. But if a stranger, who hath no right, outs the Lessee, then he shall not have a Writ of Covenant against the Lessor, because he hath remedy by Action against the stranger; but if a stranger enter by elder Title, then he shall have a Writ of Covenant, for he hath no other Remedy.

This shews the Law gives not Remedy to the Lessee upon the Covenant, when he hath a proper and natural Remedy against another who doth the wrong.

By the same Reason, if the Lessee be by express Covenant to enjoy his term (or enjoy it against all men, which is the same) he shall not have an Action of Covenant against the Lessor, unless he be legally outed or evicted: For if he be outed tortiously by any stranger, he hath his Remedy.

So is the express Book of 26 H. 6. f. 3. b. where it is agreed, That the warranty of a Lease for years, is but an Action of Covenant, which extends not to tortious Entries for the former Reason.

Yet I agree, If the Lessor expressly Covenants that the Lessee shall hold and enjoy his term without the Entry or Interruption of any, whether such Entry or Interruption be lawful or tortious? There the Lessor shall be charg'd by an Action of Covenant for the tortious Entry of a stranger, because no other meaning can be given to his Covenant.

Accordingly the new Authorities run grounded upon that sound and ancient Reason of Law, That the Lessor shall not be charg'd with an Action upon his express Covenant for enjoyment of the term against all men, where the Lessee hath his proper Remedy against the wrong doer.

Against this Truth there is one Book that hath, or may be pretended, which I will cite in the first place, because the Answer to it may be more perspicuous from the Authority I shall after deliver to rebargue that Case.

Dyer, 15, 16  
Eliz. 328. a.  
pl. 8.

It is the Case of Mountford and Catesby in the Lord Dyer. Catesby, in consideration of a Sum of money and a Horse, made a Lease to Mountford for term of years, Et super se assumpsit, quod the Plaintiff Mountford pacifice, & quiete haberet & gauderet, the Land demis'd durante termino sine evizione & interruptione alicujus personæ; after Catesby's Father entred upon him and so interrupted him; whereupon Mountford brought his Action upon this Assumpsit, and Catesby pleaded he did not assume, and found against him. It was moved in Arrest of Judgment for the Defendant, That the entry might be wrongful, for which the Plaintiff had his Remedy, but disallowed, and Judgment affirmed for the Plaintiff; because, saith the Book, it is an express presumption and assumption, that the Plaintiff should not be interrupted: And this Case is not expressly denied to be Law in Essex and Tisdales Case in the Lord Hobart, as being an express Assumption.

Though the Lord Dyers Case be an Action of the Case upon an Assumpsit, and our Case an Action of Covenant; yet in the nature of the Obligation there seems no difference, but in the form of the Action: For to assume that a man shall enjoy his term quietly, without interruption, and to covenant he shall so enjoy it, seems the same undertaking.

But if the reason of Law differ in an Assumpsit from what it is in a Covenant, as seems implied in Tisdales Case, then this Case of the Lord Dyer makes nothing against the Case in question, which is upon a Covenant, not an Assumpsit.

Mob. f. 3435.

1. Elias Tisdale brought an Action of Covenant against Sir William Essex, and declared, That Sir William, convenit, promissit, & agreavit, ad & cum prædict. Elia quod ipse idem Elias haberet, occuparet, & gauderet, certain Lands for Seven years, into which he entred, and that one Elsing had Ejected him, and kept him out ever since. Resolv'd because no Title is laid in Elsing, he shall be taken to enter wrongfully, and the Lessee hath his Remedy against him. Therefore adjudg'd for the Defendant Essex.

Here is a Covenant for enjoying during the term, the same with enjoying without interruption; (for if the enjoyment be interrupted, he doth not enjoy during the term) the same with enjoying without any interruption, the same with enjoying without interruption of any person; which is the Lord Dyers Case, but here adjudg'd the interruption must be legal, or an Action of Covenant will not lye, because there is remedy against the Interrupter. So is there in the Lord Dyer's Case.

And

And a Rule of that Book is, That the Law shall never judge that a man Covenants against the wrongful acts of strangers, unless the words of the Covenant be full, and express to that purpose: which they are not in our present Case, because the Law defends against wrong.

Brocking brought an Action upon an Assumpsit against one Cham, and declared, That the Defendant assumed the Plaintiff should enjoy certain Lands according to his Lease, without the lett, interruption, or incumbrance of any person; and shews in Fact, That this Land was extended for Debt due to the King by process out of the Exchequer, and so incumbered. After Verdict for the Plaintiff, it was moved in Arrest of Judgment, That no good breach was assigned, because he did not shew that the Incumbrance was a lawful Incumbrance, for else he might have his Remedy elsewhere, and Judgment was given for the Defendant.

Brocking  
ver. s. Cham,  
Cr. 15 Jac.  
44.5.p.10.

This Case was upon an Assumpsit, as the Lord Dyers was, and by as ample words; for the Land was to be enjoyed without any lett, which is equivalent to the words of quiete & pacifice, in the Lord Dyers Case; which is a Case in terminis, adjudged contrary to that in the Lord Dyer, and upon the same reason of Law in an Assumpsit, as if it had been a Covenant, viz. because the Plaintiff had his Remedy against the wrong doer.

Chauntfloure brought an Action of Covenant against one Priestly and Doctor Waterhouse, as Executors of John Mountfitchett, and declared, That the Testator had sold him Nine and twenty Tuns of Copras, and agreed, That if the Testator failed of payment of a certain Sum of money upon a day certain, That the Plaintiff might quietly have and enjoy the said Copras, that the money was not paid at the day, and that he could not have and enjoy the said Nine and twenty Tuns of Copras; Judgment was given by Nihil dicat against the Defendants, and upon a Writ of Enquiry of Damages, 260 l. Damages given: Upon motion in Arrest of Judgment, It was resolved by the whole Court, That the breach of Covenant was not well assign'd, because no lawful disturbance was alledg'd, and if he were illegally hindered or disturbed of having the Copras which he had bought, he had sufficient remedy against the wrong doers.

Cr. 45 El.  
694.pl.4

Dod was bound in an Obligation to Hammond, conditioned that Hammond and his Heirs might enjoy certain Copyhold Lands surrendered to him. The Defendant pleaded the Surrender, and that the Plaintiff entered, and might have enjoyed the Lands: To which the Plaintiff replied, That after his Entry, one



one Gay entred upon him, and outed him; It was adjudg'd the Replication was naught, because he did not shew that he was e-  
victed out of the Land by lawful Title; for else he had his Re-  
medy against the wrong doer.

This was in an Action of Debt upon a Bond, condition'd for  
quiet enjoyment: So as neither upon Covenant, upon Assump-  
sit, or Bond condition'd for quiet enjoying, unless the breach be  
assign'd for a lawful Entry or Eviction, (and upon the same  
reason of Law, because the lessee may have his Remedy against  
the wrong doers) an Action of Covenant cannot be maintain'd.

Cok. 4 Rep.  
Nokes's Case.

To these may be added a Resolution in Nokes his Case in the  
fourth Report, where a man was bound by Covenant in Law,  
That his Lessee should enjoy his term, and gave Bond for per-  
formance of Covenants, in an Action of Debt brought upon the  
Bond; the breach was assign'd, in that a stranger had recover'd  
the Land leas'd in an Ejectione firmæ, and had Execution, though  
this Eviction were by course of law, yet for that an elder and  
sufficient Title was not alledg'd upon which the Recovery was  
had, it was no breach of the Covenant.

### Inconveniencies if the Law should be otherwise.

1. A mans Covenant, without necessary words to make it such,  
is strain'd, to be unreasonable, and therefore improbable to be  
so intended; for, it is unreasonable a man should Covenant a-  
gainst the tortious acts of strangers, impossible for him to pre-  
vent, or probably to attempt preventing.

2. The Covenantor, who is innocent, shall be charg'd, when  
the Lessee hath his natural Remedy against the wrong doer:  
And the Covenantor made to defend a man from that from which  
the Law defends every man, that is, from wrong.

3. A man shall have double Remedy for the same injury a-  
gainst the Covenantor, and also against the wrong doer.

4. A way is open'd to damage a third person (that is the Cove-  
nantor) by undiscoverable practise between the Lessee and a stran-  
ger, for there is no difficulty for the Lessee secretly to procure a  
stranger to make a tortious Entry, that he may therefore charge  
the Covenantor with an Action.

## Application of the Reason of Law to the Case in Question.

1. When a man Covenants his Lessee shall enjoy his term against all men, he doth neither expressly covenant for his enjoyment against tortious Acts, nor doth the Law so interpret his Covenant.

So here, when the Lessor Covenants the Lessee shall enjoy against his Assigns, he doth not covenant expressly against these tortious acts, nor ought the Law to interpret that he doth, more than in the other Case.

2. It is as unreasonable he should Covenant against the tortious Entries of his Assigns, as against the tortious Entries of all other strangers; For he hath no prosper, who of his Assigns may wrongfully Eject his Lessee, more than what other stranger may do it, nor any power to prevent the tort of the one, more than of the other, as being equally unknown to him. Nor is there any sensible difference to be found, where a man Covenants his Lessee shall enjoy quietly against all the Johns and all the Thomasses in the world, than where against all men; for though the one Covenant be narrower than the other, yet the Covenantor can no more prevent the wrongs may be done by the Johns and Thomasses, than he can the wrongs may be done by any man: Nor can the Covenantee fear more a wrong to be done by them, than by any other person not so named.

3. If the Assignee of the Lessor enters tortiously upon the Lessee, he hath his proper and natural Remedy equally against him, as against any other stranger that so doth.

4. If the Lessee may charge the Covenantor with an Action in this Case, for his Assignees tortious Entry, then he may be doubly satisfied for the same Damage; viz. by the Covenantor upon his Covenant, and by the Assignee for his Trespas, which the Law permits not, but in rare Cases, and upon special Reasons.

5. The Lessee may as well combine with some remote Assignee of the Lessors to make a wrongful Entry, to the end to charge the Covenantor therewith upon his Covenant, as with any other stranger.

6. Lastly,

6. Laſtly, by the very words of this Covenant, the Leſſor cannot be charg'd with breach of Covenant for the tortious Entry or Interruption of his Aſſignee. The words are, That the Leſſee ſhould lawfully, legitime haberet, teneret, & gauderet, & tenere, & gaudere potuiſſet, the Premiſſes without the Lett, Interruption, &c. of the Defendant, his Executors, Adminiſtrators, and Aſſigns.

If the Leſſor were to be charg'd with the tortious Acts of his Aſſigns, there needed no more (if thoſe words would do it) than to ſay, That the Leſſee ſhould have, hold, and enjoy the Lands demis'd, without interruption of the Leſſor, his Executors, Adminiſtrators; and the word lawfully was uſeleſs and ſenſeleſs in the Covenant alſo.

But when it is ſaid, That he ſhould and might lawfully have, hold, and enjoy it againſt the Leſſor, his Executors, Adminiſtrators, and Aſſigns, What other meaning can be given the words, than that he might, according to Law, enjoy it, and that the Leſſor, his Executors, Adminiſtrators, or Aſſigns, ſhould not have power lawfully to hinder him?

For a man then is ſaid to enjoy a thing lawfully, when no man lawfully can hinder his enjoying it.

So as by all the Authorities cited by all the Reaſons of Law anciently and modernly, and by the particular words of the Covenant in queſtion, the Defendant cannot be charg'd with breach of his Covenant for the tortious Entry of his Aſſignee upon the Plaintiff.

A Replevin brought, and the beaſts retorn'd Elongata, whereupon there was a Capias in Withernam, and Nine Oxen taken, the Plaintiff in the Replevin gave the Sheriff's Bailiff a Bond of Ten pounds to ſave him harmleſs for thoſe Oxen; the Defendant in the Replevin, whoſe Beaſts they were, brought a Detinue againſt the Bailiff, and thereupon he ſued his Bond for his Damage, in being diſtrain'd in the Detinue; this appearing to the Court, and Judgment demanded in the Action of Debt. Brintley ſaid, *Quides vous que il doit Defender encounter tous le Mond, non ferra ne encounter null Action, aut quel vous poies aver droiturel defence ſans luy per la ley per que avifes vous,* and ſo was the general Opinion, but it was not adjudg'd.

## The Difference between this Covenant and a general Covenant againſt all men.

1. It is ſaid this is not a general Covenant to enjoy againſt all men, wherein the Law is clear, but rather a Covenant againſt particular men.

2. That there is Authority, That if a man Covenant for quiet Enjoyment againſt a particular perſon, that Covenant ſhall extend to the tortious, as well as legal Entries, of ſuch particular perſon.

The Covenant in queſtion is no particular Covenant, though it be not the moſt general; no more is a Covenant to enjoy againſt all of the names of Thomas and John, or againſt all men now living, or againſt all claiming under the Covenantor, yet no man conceives it more rational to charge the Covenantor for tortious Entries done by ſuch, than for the tortious Entries of men of any other name. And it is as uncertain to the Covenantor and Covenantee, who, are Assignees; or what Assignee of the Lessor will make a tortious Entry, as what other man will do it.

But not ſo of a particular perſon, who is in the Covenantors poſſeſſion, to prevent, and the Covenantees to ſeek.

3. In a Covenant for Enjoyment againſt all men, a man Covenants for enjoyment againſt himſelf, Executors, Adminiſtrators and Assigns (for they are a part of all men) but not againſt their tortious Entries, more than againſt all other mens tortious Entries.

If a man Covenant for enjoyment againſt his Executors, Adminiſtrators, and Assigns, and all others, it is not a different Covenant from that of enjoyment againſt all men; for a mans Executors, Adminiſtrators, and Assigns, and all others, are all men.

So if a man Covenants for enjoyment againſt A. B. and C. and all others, it is the ſame as to Covenant for enjoyment againſt all men; for A. B. and C. and all others, are all men: Therefore that difference that this is not a general Covenant, is, *Differentia ſoni non ponderis*, and hath no reaſon of Law to diſtinct it from a general Covenant.



## Objections.

It was smartly objected by my Brother Broome, If the Lessor shall not be charg'd upon his Covenant for the tortious Entry of his Assignee by this express Covenant, then is the Covenant useless; for by a Covenant in Law upon the Lease it self, he was to be charg'd for a legal Entry made by his Assignee, if this Covenant had not been at all.

I Answer, It is not necessary the Lessor and Lessee should understand what are Covenants in Law, and therefore they might impertinently make an express Covenant which they understood, which was already supplied by an implied Covenant, which they understood not.

As where a Feoffment is made by Dedi & concessi, which is a warranty in Law, it is not rare to have an express warranty of the same extent with the warranty in Law.

But there is a more close and solid reason why they are named in the Covenant; for if they had not been express'd, the Demise it self had been a Covenant in Law against the legal Interruptions, both of them, and all men else. But by expressing a Covenant against them, the general Covenant against all men, is thereby restrain'd, and not enlarg'd against them; for now the Lessor hath covenanted for enjoyment against the legal Violations of himself, his Executors, Administrators, and Assigns, and of no other.

This was clearly resolv'd in Nokes his Case, where a man by his Deed granted and demis'd certain Lands for years, which Demise importeth in it self a Covenant in Law, and he further expressly Covenanted for Enjoyment against himself, and all others, claiming from or under him, which express Covenant was narrower than his Covenant in Law and gave Bond for performance of Covenants. Two points were resolv'd:

1. That this Bond extended to the Covenant in Law.
2. That by the express Covenant the Covenant in Law was restrain'd, by Popham's Opinion, and all the Court.
3. It was agreed that the same had been resolv'd before about 14 El. in the Case of one Hamond. And Sir Ed. Coke in the close of the Case, saith, Much inconvenience would else happen against the intention of parties. The express Covenants in Deeds being different from the Covenants in Law usually.

4. It

4. It is there agreed, That it is not ſo in real Warranties as in Covenants, but it is at choice to take the Warranty in law, or the expreſs Warranty.

Another Objection is upon the Caſe in 46 E. 3. where the Leſſor <sup>46 E. 3. f. 4.</sup> outed his Leſſee ſor years, and infeoffed another of the Land, who held him out. It is agreed, That the Leſſee may have a quare ejecit infra terminum againſt the Feoffee, yet his Action was good againſt his Leſſor: But this Caſe makes nothing to the preſent Caſe.

For at the Common Law the Leſſee had no Action but of Covenant againſt his Leſſor, or an Ejectione firmæ, at his choice.

The Quare Ejecit infra terminum is given by the Statute of Weſtmiſter 2. cap. 24. for recovery of his term againſt the Feoffee; for an Ejectione firmæ lies not againſt him becauſe he came to the Land by Title of Feoffment, and not by tort: And this new Remedy by Statute takes not away the ancient at Common Law, but the Common Law gives not two Satisfactionſ for the ſame Injury, as it would if the Covenantor and the Trefpaſſor were both charg'd to answer the Leſſee, and ſo the Book reſolves.

The Book of 2 E. 4. f. 15. may be objected, A man infeoffed another, and entred into Bond to warrant and defend the Land ſor twelve years: Two Judges, the Court riſing, ſeemed to doubt whether the word defend might not extend to defend from Entries, &c.

The difference ſome take of a Covenant to enjoy againſt one or moſt particular men, and to enjoy againſt all men; as if in the firſt Caſe the Covenantor were to be charg'd for the tortious Entries of particular men, but not where the Covenant is againſt all men, I underſtand not. As if all particular men, could they be enumerated, were not the ſame with all men; and as if ſome particular men were not a part of all particular men; and the reaſon of Law is the ſame for one as for all; the party hath his Remedy againſt the wrong doer, and the Covenant meaning no more whether againſt one or all, than that the Leſſee ſhould have an indefeſſible Title in Law, and being but in nature of a Warranty.

The Caſe which gave colour to this Opinion, That if a man covenants for enjoyment againſt a particular perſon or perſons, that he covenants as well againſt their tortious Entries as legal.

The Caſe of Wilſon and Foſter againſt Leonard Mapes 32 El. <sup>Hob. f. 31.</sup> remembred in Tiſdels Caſe in the L. Hob. and reported by Crook. <sup>Cro. 32 El. f. 212. pl. 4.</sup>

Mapes made a Leaſe of the Parſonage of Brankiſter to Wilſon and Foſter ſor a year, and covenanted to ſave them harmleſs ſor that years profits, againſt one Blunt then Parſon of Brankiſter; who entred upon them, and took the Tithes.

In an Action of Covenant brought against Mapes by Wilson and Folter, though they did not set forth any good Title in Mr. Blunt for that years profits, it was judg'd for the Plaintiffs, because, saith the Lord Hobert, the Covenant was to save them harmless for that years profits, against such a man particularly.

Which importeth they should not be dammified in that years profits by Blunt, which was more than to warrant the Title, for Blunt might go beyond the Seas, dye insolvent, and so prevent them of their Remedy for the profits.

So in Crook it is said, That the Covenant being against a particular man, it extends to his tortious Entries arguendo, but there it appearing that Blunt was Parson of the Rectory, the Court was of Opinion that his Entry was legal and good, and therefore the Covenantor, in that Case, was charg'd for a legal Entry, and not a wrongful. So is the Book exprels in the end of the Case.

If a man upon Sale of Land refuses to give a general Warranty against all men, but narrows his Warranty, and gives only against him and his Heirs, this alters not the nature of the Warranty (as to make him any way answer for tortious Entries, or to subject him to any thing more than his Warranty against all men subjected him: So in a Covenant upon a Lease for Enjoyment against him and his Assigns, which (is in the nature of a Warranty for a Chattel) he shall not otherwise be charg'd by his Covenant, than if he had covenanted, that is, warranted, against all men.

*Hill. 22 & 23 Car. II. C. B. Rot. 680.*

*William Shute Plaintiff, John Higden Defendant, In  
Trespas and Ejectment.*

**T**H E Plaintiff declares, That Hugh Ivy Clerk, the Tenth of May, 22 Car. 2. at Wrington demis'd to the said William, One Messuage, Twenty Acres of Land, Twenty Acres of Meadow, Twenty Acres of Pasture, with the Appurtenances in Wrington; And also the Rectory and Parish Church of Wrington, Habendum to the said William and his Assigns, from the Fifth day of May aforesaid, for the term of Five years next ensuing.

By virtue whereof he entred into the said Tenements and Rectory, and was possess'd, until the Defendant the said Tenth day of May, in the said year, entred upon him, and Ejected him, to his Damage of Forty pounds.

The Defendant, by words of course, pleads he is not Culpable, and Issue is joyn'd, and the Verdict was taken by Default of the Defendant, and the Jury find specially.

Upon the Special Verdict, the Case appears to be this,

John Higden the Defendant, was lawfully presented, admitted, instituted, and inducted into the Rectory of Wrington in the County of Somerset, and Dioces of Bath and Wells, in February 1664. being a Benefice with Cure of Souls, and of clear yearly value of Fifty pounds per Annum, and in the King's Books of no more than Five pounds yearly, and that the Premises demis'd were time out of mind, and yet are, parcel of the said Rectory.

That the said John Higden, being lawful Incumbent of the said Church and Rectory of Wrington, the One and thirtieth of March, 1669. was lawfully presented, admitted, instituted, and inducted into the Rectory of Elme in the said County and Dioces, being a Benefice with Cure of Souls also of clear yearly value, ultra reprisas, of Forty pounds per Annum, and of the value of Ten pounds per Annum in the King's Books, and subscribed  
the



13 El. cap. 12. the Articles of Religion according to the Act of the Thirteenth of the Queen, and was lawful Incumbent of the ſaid Rectory of Elme, but after did not read the Articles of Religion within two Months after his Induction in the Church of Elme, according to the Act of 13 Eliz.

Primo Maii 1669. Hugh Ivy, Leſſor of the Plaintiff, was lawfully preſented, admitted, inſtituted, and inducted into the Rectory of Wrington, as ſuppoſed void, and performed all things requiſite for a lawful Incumbent of the ſaid Rectory to perform, both by ſubſcribing and reading the Articles of Religion, according to the Statute of 13 Eliz.

And that he entered into the ſaid Rectory and Premiſſes, and made the Leaſe to the Plaintiff, as in the Declaration.

That the ſaid Higden the Defendant, did enter upon the Plaintiff the ſaid Tenth of May, 1669. as by Declaration.

The Questions ſpoken to at the Barr, in this Caſe, have been two.

1. Whether the Rectory of Wrington, being a Benefice with Cure, and of clear yearly value of Fifty pounds, and but of Five pounds in the King's Books, ſhall be eſtimated according to Fifty pounds per Annum, to make an Avoidance within the Statute of 21 H. 8. by the Incumbents accepting another Benefice with Cure?

But that is no Queſtion within this Caſe; for be it of value or under value, the Caſe will be the ſame.

2. Whether not reading the Articles according to the Statute of 13 Eliz. within two Months after Induction into the Church of Elme, ſhall exclude Higden not only from the Rectory of Elme, but from the Rectory of Wrington? which is no point of this Caſe: For whether he read or not read the Articles in the Church of Elme, he is excluded from any right to the Church of Wrington.

For this Caſe depends not at all upon any Interpretation of the Statute of 21 H. 8. of Pluralities; but the Caſe is ſingly this,

Higden being actual and lawful Incumbent of Wrington, a Benefice with Cure, be it under the value of Eight pounds yearly, or of the value, or more, accepts another Benefice with Cure (the Rectory of Elme) and is admitted, inſtituted, and inducted lawfully to it, be it of the value of Eight pounds or more, or under.

The

The Patron of Wrington within one month after admission institution, and induction of Higden, the Incumbent of Wrington to the Rectory of Elme, presents Hugh Ivy, the Plaintiffs Lessee to Wrington, who is admitted, instituted, and inducted thereto the same day, and after, as by the Declaration, enters and makes a Lease to the Plaintiff, who is Ejected by the Defendant Higden.

The Doubt made by the Jury, is, if Higdens Entry be lawful.

It hath been resolved in Holland's Case, and likewise in Digby's Case, in the Fourth Report, and often before, since the Council of Lateran, Anno Dom. 1215. That if a man have a Benefice with Cure, whatever the value be, and is admitted and instituted into another Benefice with Cure, of what value soever, having no qualification or dispensation, the first Benefice is ipso facto, so void, that the Patron may present another to it if he will.

But if the Patron will not present, then if under the value, no lapse shall incur until deprivation of the first Benefice, and notice; but if of the value of Eight pounds, or above, the Patron, at his peril, must present within Six months, by 21 H. 8.

As to the Second Question, Whether the Defendants, not reading the Articles in the Church of Elme, within two months after his induction there, have excluded him not only from being Incumbent of Elme, but also from Wrington? The Answer is,

First, His not reading the Articles in the Church of Elme, according to the Statute of 13. is neither any cause of, nor doth contribute to his not being still Incumbent of Wrington; though, as his Case is, he hath no right to the Rectory of Wrington, since the admission, institution, and induction of Hugh Ivy, the Plaintiffs Lessee, into it, as hath already appeared.

Secondly, As for the Rectory of Elme, although it doth not appear that the Patron of Elme hath presented, as he might have done, or perhaps hath, any other Clerk; or that any other is admitted and instituted into that Church; yet Mr. Higden can be no Incumbent there, nor can sue for Tithes, nor any other Duty; because, by not reading the Articles, he stands deprived ipso facto.

Under Pope Innocent 3. Digby's Case. Vid. Bon. C. pur Pluralities. Anderson 1. part. f. 200. b. p. 236 Vid. Moore's Rep. a large Case to the same effect, viz. Holland & Digby's Case.

For clearing this, certain Clauses of the Act of 13 Eliz.  
are to be open'd.

The first is;

Every person, after the end of this Session of Parliament, to be admitted to a Benefice with Cure, except that within two Months after his induction, he publickly read the said Articles in the same Church whereof he shall have Cure, in the time of Common-prayer there, with Declaration of his unfeigned assent thereto, &c. shall be upon every such Default, *ipso facto*, immediately depriv'd.

There follows, relative to this Clause,

Provided always, That no Title to conferr or present by lapse, shall accrue upon any deprivation, *ipso facto*, but after six Months after notice of such deprivation given by the Ordinary to the Patron.

By these Clauses immediately upon not reading the Articles, according to the Statute, the Incumbent is depriv'd *ipso facto*.

And the Patron may presently, upon such Deprivation, present if he will, and his Clerk ought to be admitted and instituted, but if he do not, no lapse incurs until after six months after notice of the Deprivation given to the Patron by the Ordinary, who is to supply the Cure until the Patron present.

Another Clause of the Statute is, No person shall hereafter be admitted to any Benefice with Cure, except he then be of the Age of Three and twenty years at the least, and a Deacon, and shall first have subscribed the said Articles in the presence of the Ordinary, &c.

And relative to this Clause there is a third. That all Admissions to Benefices, Institutions, and Inductions of any person, contrary to any provision of this Act, shall be utterly void in Law, as if they never were.

Now though the Church of Wringlington became void immediately, of what value soever it were, by admission and institution of the Defendant into the Church of Elme, by the ancient Canon Law receiv'd in this Kingdom, which is the Law of the Kingdom in such Cases, if the Patron pleas'd to present.

And so that the Patron accordingly did within a month after the Defendants Admission and Institution into the Rectory of Elme, present his Clerk, Hugh Ivy, to the Church of Wringlington, who was thereto Admitted, Instituted, and Inducted within that time, which was a month before the Defendant was depriv'd for not reading the Articles in the Church of Elme.

Where-

Whereby any Interest the Defendant had to Wrington, was wholly aboiled, as the Case is.

Pet if the Church of Wrington had been under value, and the Patron had not presented to it his Clerk before Higden's Depriuation of the Church of Elme, he might not have still continued Parson of Wrington, as if never Admitted, Instituted, or Inducted to the Rectory of Elme.

But if he had not subscribed the Articles before the Ordinary, upon his Admission and Institution to the Rectory of Elme, he had never been Incumbent of Elme, and consequently never accepted a second Benefice to disabie him of holding the first.

And so it is resolv'd in the last Case of the Lord Dyer, 23 of the Queen, where a man having a Living with Cure under value, accepted another under value also, having no Qualification or Dispensation, and was Admitted, Instituted, and Inducted into the Second, but never subscribed the Articles before the Ordinary, as the Statute of 13. requires. Upon question, whether the first Living, vacavit per mortem, of him, or not? the Court resolv'd, That the first Living became vacant by his death, and not by accepting the second, because he was never Incumbent of the second, for not subscribing the Articles before the Ordinary, whereby his Admission, Institution, and Induction into the second Living became void, as if they had never been.

This Case was urg'd at the Barr for the Defendant, as if his not reading the Articles within two months after his Induction into Elme, had still (as in the Lord Dyers Case) left him Incumbent of the first Living.

But that was mistaken, for not subscribing the Articles, made that he never was Incumbent of the second Living, and consequently then there was no cause to lose the first.

But the Defendant having subscribed the Articles upon his Admission and Institution, was perfect Incumbent, pro tempore, of the second Living, and thereby lost the first, and afterwards lost the second, for not reading the Articles within two months after his Induction, so as he was compleat Incumbent by Admission, Institution, and Induction of the second Living, full two months before he lost it.

It was upon this Clause of the Statute smartly urg'd by my Brother Baldwyn, That if the Statute makes the Defendants Admission, Institution, and Induction to the second Living void, as if they had never been; For what reason doth he not still retain his first? The Answer is as before.

¶

1. That



1. That his not retaining the first, is no effect nor consequent of his losing the second.

But the first was lost because he accepted a second, and the right Patron thereupon presented to the first; so as he lost the first, whilst he was, and for being, lawful Incumbent of the second: And therefore could be no effect nor consequent at all proceeding from his loss of the second, by not reading the Articles after, more than if he had lost the second by Deprivation for Heresie, or other cause.

2. The Clause of 13. is not, That all Admissions, Institutions, and Inductions to Benefices, where any person is depriv'd by virtue of that Act, shall be void as if they never were; for so would the Clause have been to warrant the Objection made at the Barr.

But the Clause is, That all Admissions, Institutions, and Inductions made contrary to any provision of the Act, shall be void, as if they never were.

But Higden's Admission, Institution, and Induction to the Church of Elme, was not contrary to any provision of the Act, but every way legal; but had he not subscribed the Articles before the Ordinary, then his Admission, Institution, and Induction had been contrary to the provision of the Act, and so void, as if they never were.

The Chief Justice delivered the Opinion of the Court, and Judgment was given for the Plaintiff.

## Busbell's Case.

**T**H E King's Writ of Habeas Corpus, Dat. 9 die Novembris, 22 Car. 2. issued out of this Court, directed to the then Sheriffs of London, to have the Body of Edward Busbell, by them detained in Prison, together with the day and cause of his Caption and Detention, on Friday then next following, before this Court, to do and receive as the Court should consider; as also to have then the said Writ in Court.

Of which Writ, Patient Ward and Dannet Foorth, then Sheriffs of London, made the Return following, annex'd to the said Writ.

That at the Kings Court of a Session of Oyer and Terminer, held for the City of London, at Justice Hall in the Old Baily, London, in the Parish of St. Sepulchres in Farringdon Ward without London, on Wednesday 31 die August. 22 Car. 2. before Sir Samuel Sterling then Mayor of London, and divers other his Majesties Justices, by virtue of his Majesties Letters Patents, under the Great Seal of England, to them, any four or more of them, directed to enquire, hear, and determine, according to the tenor of the said Letters Patents, the Offences therein specified: And amongst others, the Offences of unlawful Congregating and Assemblies, within the limits appointed by the said Commission within the said City, as well within Liberties as without. *Edward Busbell*, the Prisoner at the Barr, was committed to the Goal of Newgate, to be there safely kept, under the Custody of *John Smith* Knight, and *James Edwards*, then Sheriffs of the said City, by virtue of a certain Order, then, and there made by the said Court of Sessions, as followeth:

Ordinatum est per Curiam hic quod Finis 40 Marcarum separatim ponatur super *Edwardum Busbell*, and other Eleven persons particularly named, and upon every of them, being the Twelve Jurors, then, and there sworn, and charg'd to try several Issues, then, and there joyn'd between our Lord the King, and *William Penn* and *William Meade*, for certain Trespasses, Contempts, unlawful Assemblies and Tumults, made and perpetrated by the

said *Penn* and *Mead*, together with divers other unknown persons, to the number of Three hundred, unlawfully and tumultuously assembled in *Grace-Church-street* in *London*, to the disturbance of the Peace, whereof the said *Penn* and *Mead* were then Indicted before the said Justices. Upon which Indictment, the said *Penn* and *Mead* pleaded they were Not guilty. For that they, the said Jurors, then, and there, the said *William Penn* and *William Mead*, of the said Trespasses, Contempts, unlawful Assemblies and Tumults, Contra legem hujus Regni *Anglia*, & contra plenam & manifestam evidentiam, & contra directionem Curiae in materia legis, hic, de & super praemissis eisdem Juratoribus versus praefatos *Will. Penn* & *Will. Mead*, in Curia hic aperte datam, & declaratam de praemissis, iis impositis in Indictamento praedicto acquieverunt, in contemptum Domini Regis nunc, legumque suarum, & ad magnum impedimentum & obstructionem Justitiae, necnon ad malum exemplum omnium aliorum Juratorum in consimili casu delinquentium. Ac super inde modo ulterius ordinatum est per Curiam hic quod praefatus *Ed. Busbell*, capiatur & committatur Gaolae dicti Domini Regis de *Newgate*, ibidem remansurus quousque solvat dicto Domino Regi 40 Marcas pro fine suo praedicto, vel deliberatus fuerit, per debitum legis Cursum. Ac eodem *Edwardo Busbell* ad tunc, & ibidem capto & commisso existente ad dictam Gaolam de *Newgate*, sub custodia praefat. *Johannis Smith* & *Jacobi Edwards* ad tunc Vic. Civitatis *Lond.* praedict. & in eorum Custodia in Gaola praedict. existente & remanente virtute ordinis praedict. iidem *Johannes Smith* & *Jacobus Edwards*, postea in eorum exitu ab officio Vic. Civitatis *Lond.* praedict. scilicet 28 die *Septembris*, Anno 22. supra dicto eundem *Edwardum Busbell* in dicta Gaola dicti Domini Regis ad tunc existentem, deliberaverunt nobis praefatis nunc Vicecomitibus Civitatis praedict. in eadem Gaola, salvo custodiendum secundum Tenorem, & effectum ordinis praedict. Et quia praedictus *Edwardus*, nondum solvit dicto Domino Regi praedictum finem 40 Marcarum, nos iidem nunc Vicecomites Corpus ejusdem *Edwardi* in Gaola praedicta, hucusque detinuimus, & haec est causa captionis & detentionis praefati *Edwardi*, cujus quidem Corpus coram praefatis Justitiariis paratum habemus.

The Writ of Habeas Corpus is now the most usual Remedy by which a man is restored again to his Liberty, if he have been against Law deprived of it.

There.

Therefore the Writ commands the Day, and the cause of the Caption and Detaining of the Prisoner to be certified upon the Return, which if not done, the Court cannot possibly judge whether the cause of the Commitment and Detainer be according to Law, or against it.

Therefore the cause of the Imprisonment ought, by the Return, to appear as specifically and certainly to the Judges of the Return, as it did appear to the Court or Person authorized to commit; else the Return is insufficient, and the consequence must be,

That either the Prisoner, because the cause return'd of his Imprisonment is too general, must be discharged; when as if the cause had been more particularly return'd, he ought to have been remanded; or else he must be remanded, when if the cause had been particularly return'd, he ought to have been discharged: Both which are Inconveniences not agreeing with the dignity of the Law. (There is a specious Exception to this Rule, but doth not materially vary it, as shall appear.)

In the present Case it is return'd, That the Prisoner, being a Jury-man, among others charg'd at the Sessions Court of the Old Bailey, to try the Issue between the King, and Penn, and Mead, upon an Indictment, for assembling unlawfully and tumultuously, did contra plenam & manifestam evidenciam, openly given in Court, acquit the Prisoners indicted, in contempt of the King, &c.

The Court hath no knowledge by this return, whether the Evidence given were full and manifest, or doubtful, lame, and dark, or indeed Evidence at all material to the Issue, because it is not return'd what Evidence in particular, and as it was deliver'd, was given. For it is not possible to judge of that rightly, which is not expos'd to a mans Judgment. But here the Evidence given to the Jury is not expos'd at all to this Court, but the Judgment of the Court of Sessions upon that Evidence is only expos'd to us; who tell us it was full and manifest. But our Judgment ought to be ground'd upon our own inferences and understandings, and not upon theirs.

It was said by a Learned Judge, If the Jury might be fined for finding against manifest Evidence, the return was good, though it did not express what the Evidence particularly was, whereby the Court might Judge of it, because returning all the Evidence would be too long. A strange Reason: For if the Law allow me remedy for wrong Imprisonment, and that must be by judging whether the cause of it were good, or not, to say the cause is too



too long to be made known, is to say the Law gives a remedy which it will not let me have, or I must be wrongfully imprison'd still, because it is too long to know that I ought to be freed? What is necessary to an end, the Law allows is never too long. Non sunt longa quibus nihil est quod demere possis, is as true as any Axiom in Euclid. Besides, one manifest Evidence return'd had suffic'd, without returning all the Evidence. But the other Judges were not of his mind.

If the return had been, That the Jurors were committed by an Order of the Court of Sessions, because they did, minus juste, acquit the persons indicted.

Or because they did, contra legem, acquit the persons indicted.

Or because they did, contra Sacramentum solum, acquit them.

The Judges cannot upon the present more judge of the legal cause of their commitment, than they could if any of these causes, as general as they are, had been return'd for the cause of their commitment. And the same Argument may be exactly made to justify any of these returns, had they been made as to justify the present return, they being equally as legal, equally as certain, and equally as far from possessing the Court with the truth of the cause: and in what condition should all men be for the just Liberty of their persons, if such causes should be admitted sufficient causes to remand persons to prison.

To those Objections made by the Prisoners Council against the Return, as too general.

1. It hath been said, That Institutum est quod non inquiratur de discretione Judicis.

2. That the Court of Sessions in London, is not to be look'd on as an inferiour Court, having all the Judges Commissioners. That the Court having heard the Evidence, it must be credited, that the Evidence given to the Jury of the Fact was clear, and not to be doubted.

As for any such Institution pretended, I know no such, nor believe any such, as it was apply'd to the present cause; but taking it in another, and in the true sense, I admit it for truth: that is; when the King hath constituted any man a Judge under him, his ability, parts, fitness for his place, are not to be reflected on, censured, defamed, or vilified by any other person, being allowed and stamp'd with the Kings Approbation, to whom

whom only it belongs to judge of the fitness of his Ministers.

And such scandalous Assertions or Inquiries upon the Judges of both Benches, is forbidden by the Statute of Scandalum Magnatum, 2 R. 2. c. 5. Noz must we, upon supposition only, either admit Judges deficient in their Office, for so they should never do any thing right; noz on the other side, must we admit them unerring in their places, for so they should never do any thing wrong.

And in that sense the saying concerns not the present Case.

But if any man thinks that a person concern'd in Interest, by the Judgment, Action, or Authority exercis'd upon his person or fortunes by a Judge, must submit in all, or any of these, to the implied discretion and unerringness of his Judge, without seeking such redress as the Law allows him, it is a persuasion against common Reason, the received Law, and usage both of this Kingdome, and almost all others.

If a Court, Inferiour or Superiour, hath given a false or erroneous Judgment, is any thing more frequent than to reverse such Judgments by Writs of False Judgment, of Error, or Appeals, according to the course of the Kingdome.

If they have given corrupt and dishonest Judgments, they have in all Ages been complained of to the King in the Starr-Chamber, or to the Parliament.

Andrew Horne, in his Mirror of Justices, mentions many Judges punish'd by King Alfred before the Conquest, for corrupt Judgments, and their particular Names and Offences, which could not be had but from the Records of those times.

Our Stories mention many punish'd in the time of Edward the First, our Parliament Rolls of Edward the Third's time, of Richard the Second's Time, for the pernicious Resolutions given at Nottingham Castle, afford Examples of this kind: In latter times, the Parliament Journals of 18 and 21 Jac. the Judgment of the Ship-mony in the time of Charles the First, question'd, and the particular Judges impeacht. These Instances are obvious, and therefore I but mention them.

In cases of retorning too general upon Writs of Habeas Corpus, of many I could urge, I will instance in two only.

One Astwick brought by Habeas Corpus to the Kings Bench, was retorn'd to be committed, per Mandatum Nicholai Bacon Militis, domini Custodis magni Sigilli Angliæ virtute cujusdam Contemptus in Curia Cancellar. facti, and was presently bail'd.

13 Jac. Moore  
f. 839.

One Apsley, Prisoner in the Fleet, upon a Habeas Corpus, was retozn'd to be committed, per considerationem Curiz Cancellar. pro contemptu eidem Curiz illato, and upon this retozn set at liberty.

In both these Cases, no inquiry was made, or consideration had, whether the Contempts were to the Law Court, or equitable Court of Chancery, either was alike to the Judges, lest any man should think a difference might arise thence.

The reason of discharging the Prisoners upon those retozns, was the generality of them being for Contempts to the Court, but no particular of the Contempt express, whereby the Kings Bench could judge, whether it were a cause for commitment or not.

And was it not as supposeable, and as much to be credited, That the Lord Keeper and Court of Chancery, did well understand what was a Contempt deserving commitment, as it is now to be credited, that the Court of Sessions did understand perfectly what was full and manifest Evidence against the persons indicted at the Sessions, and therefore it needed not to be reveal'd to us upon the retozn?

Hence it is apparent, That the Commitment and Return pursuing it, being in it self too general and uncertain, we ought not implicitly to think the Commitment was *re vera*, for cause particular and sufficient enough, because it was the Act of the Court of Sessions.

And as to the other part, That the Court of Sessions in London is not to be resembled to other inferiour Courts of Oyer and Terminer, because all the Judges are commission'd here (which is true) but few are there, at the same time, and as I have heard, when this Crpal was, none of them were present. However persons of great quality are in the Commissions of Oyer and Terminer, though the Shires of the Kingdom, and always some of the Judges; nor doth one Commission of Oyer and Terminer differ in its Essence, Nature, and Power from another, if they be general Commissions; but all differ in the Accidents of the Commissioners, which makes no alteration in their actings in the eye of Law.

Another fault in the retozn is, That the Jurors are not said to have acquitted the persons indicted, against full and manifest Evidence corruptly, and knowing the said Evidence to be full and manifest against the persons indicted, for how manifest soever the Evidence was, if it were not manifest to them, and that they believ'd it such, it was not a finable fault, nor deserving im-

imprisonment, upon which difference the Law of punishing Jurors for false Verdicts principally depends.

A passage in Bracton is remarkable to this purpose concerning Attaining Inquests.

Committit Jurator perjurium propter falsum Sacramentum, ut si Bracton, l. 4. ex certa scientia aliter Juraverit quam res in veritate se habuerit, c. 4. f. 288. b. si autem Sacramentum factum fuerit licet falsum, tamen non committit perjurium licet re vera res aliter se habeat quam juraverat, & quia jurat secundum conscientiam eo quod non vadit contra mentem. Sunt quidam qui verum dicunt. mentiando, sed se pejerant — quia contra mentem vadunt.

The same words, and upon the same occasion, are in effect in Fleta. Committit enim Jurator perjurium quandoque propter falsum Sacramentum, ut si ex certa scientia aliter juraverit quam res in veritate se habuerit secus enim propter factum quamvis falsum; and lest any should think that these passages are to be understood only of Jury-men perjuries in foro conscientiae, it is clearly otherwise by both those Books, which shew how, by the discreet Examination of the Judge, the Error of the Jury not without, may be prevented and corrected, and their Verdict rectified. Fleta, l. 5. c. 22 f. 336. b. 9.

And in another place of Bracton, in the same Chapter: Judex enim sive Justiciarius ad quem pertinet examinatio, si minus diligenter examinaverit, occasionem prebet perjurii Juratoribus. And after,

Et si examinati cum justo deducantur errore dictum suum emendaverint, hoc bene facere possunt, ante judicium & impune, sed post judicium non sine poena. Bract. l. 4. f. 289. a.

#### After these Authorities.

I would know whether any thing be more common, than for two men Students, Barristers, or Judges, to deduce contrary and opposite Conclusions out of the same Case in Law? And is there any difference that two men should infer distinct conclusions from the same Testimony? Is any thing more known than that the same Author, and place in that Author, is forcibly urg'd to maintain contrary conclusions, and the decision hard, which is in the right? Is any thing more frequent in the controversies of Religion, than to press the same Text for opposite Tenents? How then comes it to pass that two persons may not apprehend with reason and honesty, what a witness, or many, say, to prove in the understanding of one plainly one thing, but in the apprehension of the other, clearly the



the contrary thing? Must therefore one of these merit Fine and Imprisonment, because he doth that which he cannot otherwise do, preserving his Oath and Integrity? And this often is the Case of the Judge and Jury.

Of this mind  
were Ten  
Judges of E-  
leven, the  
Chief Baron  
Turnor gave  
no Opinion,  
because not  
at the Argu-  
ments.

I conclude therefore, That this Return, charging the Prisoners to have acquitted Penn and Mead, against full and manifest Evidence first and next, without saying that they did know and believe that Evidence to be full and manifest against the indicted persons, is no cause of Fine or Imprisonment.

And by the way I must here note, That the Verdict of a Jury, and Evidence of a Witness are very different things, in the truth and falshood of them: A Witness swears but to what he hath heard or seen, generally or more largely, to what hath fallen under his senses. But a Jury-man swears to what he can infer and conclude from the Testimony of such Witnesses, by the act and force of his Understanding, to be the Fact inquired after, which differs nothing in the Reason, though much in the punishment, from what a Judge, out of various Cases consider'd by him, infers to be the Law in the Question before him. Therefore Bracton,

Bract. f. 289. a.

Et licet narratio facti contraria sit Sacramento, & dicto precedenti, tamen falsum non faciunt Sacramentum licet faciunt factum Judicium, quia loquuntur secundum conscientiam quia falli possunt in Judiciis suis, sicut ipse Justitarius.

There is one Objection which hath been made by none, as I remember, to justify this general Return, I would give Answer to.

A man committed for Treason or Felony, and bringing a Habeas Corpus, hath return'd upon it, That he was committed for High Treason or Felony; and this is a sufficient Return to remand him, though in truth this is a general Return: For if the specifical Fact for which the party was committed, were expressed in the Warrant, it might then perhaps appear to be no Treason or Felony, but a Trespass, as in the Case of the Earl of Northumberland, 5 H. 4. question'd for Treason in raising power. The Lords adjudg'd it a Trespass; for the Powers raised were not against the King, but some Subjects.

Why then by like Reason may not this Return be sufficient, though the Fact for which the Prisoners stood committed particularly express'd, might be no cause of Commitment?

The

The Cases are not alike; for upon a general Commitment Answ. for Treason or Felony, the Prisoner (the cause appearing) may press for his Tryal, which ought not to be denied or delayed, and upon his Indictment and Tryal, the particular cause of his Imprisonment must appear, which proving no Treason or Felony, the Prisoner shall have the benefit of it. But in this Case, though the Evidence given were no full nor manifest Evidence against the persons indicted, but such as the Jury upon it ought to have acquitted those indicted, the Prisoner shall never have any benefit of it, but must continue in Prison, when remanded, until he hath paid that Fine unjustly impos'd on him, which was the whole end of his Imprisonment.

We come now to the next part of the Retorn, viz. That the Jury acquitted those indicted against the direction of the Court in matter of Law, openly given and declared to them in Court.

1. The words, That the Jury did acquit, against the direction of the Court, in matter of Law, literally taken, and de plano, are insignificant, and not intelligible; for no Issue can be joyn'd of matter in Law, no Jury can be charg'd with the tryal of matter in Law barely, no Evidence ever was, or can be given to a Jury of what is Law, or not; nor no such Oath can be given to, or taken by, a Jury, to try matter in Law; nor no Attaine can lye for such a false Oath.

Therefore we must take off this vail and colour of words, which make a shew of being something, and in truth are nothing.

If the meaning of these words, finding against the direction of the Court in matter of Law, be, That if the Judge having heard the Evidence given in Court (for he knows no other) shall tell the Jury, upon this Evidence, the Law is for the Plaintiff, or for the Defendant, and you are under the pain of Fine and Imprisonment to find accordingly, then the Jury ought of duty so to do; Every man sees that the Jury is but a troublesome delay, great charge, and of no use in determining right and wrong, and therefore the Tryals by them may be better abolish'd than continued; which were a strange new-found conclusion, after a tryal so celebrated for many hundreds of years.

For if the Judge, from the Evidence, shall by his own Judgment first resolve upon any Tryal what the Fact is, and so knowing the Fact, shall then resolve what the Law is, and order the Jury penally to find accordingly, what either necessary or convenient use can be fancied of Juries, or to continue Tryals by them at all?

But if the Jury be not oblig'd in all Tryals to follow such Directions, if given, but only in some sort of Tryals (As for instance, in Tryals for Criminal matters upon Indictments or Appeals) why then the consequence will be, though not in all, yet in Criminal Tryals, the Jury (as of no material use) ought to be either omitted or abolished, which were the greater mischief to the people, than to abolish them in Civil Tryals.

And how the Jury should, in any other manner, according to the course of Tryals us'd, find against the direction of the Court in matter of Law, is really not conceivable.

True it is, if it fall out upon some special Tryal, that the Jury being ready to give their Verdict, and before it is given, the Judge shall ask, whether they find such a particular thing propounded by him? or whether they find the matter of Fact to be as such a Witness, or Witnesses have depos'd? and the Jury answer, they find the matter of Fact to be so; if then the Judge shall declare, The matter of Fact being by you so found to be, the Law is for the Plaintiff, and you are to find accordingly for him.

If notwithstanding they find for the Defendant, this may be thought a finding in matter of Law against the direction of the Court; for in that case the Jury first declare the Fact, as it is found by themselves, to which Fact the Judge declares how the Law is consequent.

And this is ordinary, when the Jury find unexpectedly for the Plaintiff or Defendant, the Judge will ask, How do you find such a Fact in particular? and upon their answer he will say, then it is for the Defendant, though they found for the Plaintiff, or e contrario, and thereupon they raise their Verdict.

And in these Cases the Jury, and not the Judge, resolve and find what the Fact is.

Therefore alwaies in discreet and lawful assistance of the Jury, the Judge his direction is Hypothetical, and upon supposition, and not positive, and upon coercion. viz. If you find the Fact thus (leaving it to them what to find) then you are to find for the Plaintiff; but if you find the Fact thus, then it is for the Defendant.

But in the Case propounded by me, where it is possible in that special manner, the Jury may find against the Direction of the Court in matter of Law, it will not follow they are therefore finable; for if an Attaint will lye upon the Verdict so given by them, they ought not to be fined and imprisoned by the Judge for that Verdict; for all the Judges have agreed upon a full

full conference at Serjeants Inn, in this case. And it was formerly so agreed by the then Judges in a Case where Justice Hide had fined a Jury at Oxford, for finding against their Evidence in a Civil Cause. That a Jury is not finable for going against their Evidence, where an Attaint lies; for if an Attaint be brought up on that Verdict, it may be affirmed and found upon the Attaint a true Verdict, and the same Verdict cannot be a false Verdict, and therefore the Jury fined for it as such by the Judge, and yet no false Verdict, because affirmed upon the Attaint.

Another Reason that the Jury may not be fined in such case, is, because until a Jury have consummated their Verdict, which is not done until they find for the Plaintiff or Defendant, and that also be entred of Record; they have time still of deliberation, and whatsoever they have answered the Judge upon an interlocutory Question or Discourse, they may lawfully vary from it if they find cause, and are not thereby concluded.

Whence it follows upon this last Reason, That upon Tryals wherein no Attaint lies, as well as upon such where it doth, no case can be invented; wherein it can be maintained that a Jury can find, in matter of Law, nakedly against the direction of the Judge.

And the Judges were (as before) all of Opinion, That the Retorn in this latter part of it, is also insufficient, as in the former, and so wholly insufficient.

But that this Question may not hereafter revive if possible, It is evident by several Resolutions of all the Judges, That where an Attaint lies, the Judge cannot fine the Jury for going against their Evidence or Direction of the Court, without a ther Misdoemeanor.

For in such case, finding against, or following the direction of the Court barely, will not barr an Attaint, but in some case the Judge being demanded by, and declaring to, the Jury, what is the Law, though he declares it erroneously, and they find accordingly, this may excuse the Jury from the Forfeitures; for though their Verdict be false, yet it is not corrupt, but the Judgment is to be revers'd however upon the Attaint; for a man loseth not his right by the Judges mistake in the Law.

Therefore if an Attaint lies for a false Verdict upon Indictment not Capital (as this is) either by the Common or Statute Law, by those Resolutions, the Court would not fine the Jury in this case, for going against Evidence, because an Attaint lay.

Ingersalls C.  
Cr. 35 El. f.  
309. n. 19.

But



But admitting an Attaint did not lye (as I think the Law clear it did not) for there is no Case in all the Law of such an Attaint, nor Opinion, but that of Thirnings 10 H. 4. Attaint 60. & 64. for which there is no warrant in Law, though there be other specious Authority against it, toucht by none that argued this Case.

Reg. l. 122. a.

The Question then will be, Whether before the several Acts of Parliament, which granted Attaints, and are enumerated in their order in the Register, the Judge by the Common Law, in all Cases, might have fined the Jury, finding against their Evidence and direction of the Court, where no Attaint did lye, or could so do, yet if the Statutes which gave the Attaints were repealed.

If he could not in Civil Causes before Attaints granted in them, he could not in Criminal Causes, upon Indictment (wherein I have admitted Attaint lies not) for the fault in both was the same, viz. finding against Evidence and Direction of the Court, and by the Common Law; the Reason being the same in both, the Law is the same.

That the Court could not fine a Jury at the Common Law, where Attaint did not lye (for where it did, is agreed he could not) I think to be the clearest position that ever I consider'd, either for Authority or Reason of Law.

After Attaints were granted by Statutes generally; As by Westminster the First, c. 38. in Pleas Real, and by 34 E. 3. c. 7. in Pleas Personal, and where they did lye at Common Law (which was only in Writs of Assise) The Examples are frequent in our Books of punishing Jurors by Attaint.

But no Case can be offer'd, either before Attaints granted in general, or after, That ever a Jury was punish't by Fine and Imprisonment by the Judge, for not finding according to their Evidence, and his Direction, until Popham's time, nor is there clear proof that he ever fined them for that Reason, separated from other Misdemeanors. If Juries might be fined in such Case before Attaints granted, why not since? for no Statute hath taken that power from the Judge. But since Attaints granted, the Judges resolved they cannot fine where the Attaint lies, therefore they could not fine before. Sure this latter Age did not first discover that the Verdicts of Juries were many times not according to the Judges opinion and liking.

But the Reasons are, I conceive, most clear, That the Judge could not, nor can fine and Imprison the Jury in such Cases.

Without

Without a Fact agreed, it is as impossible for a Judge; or any other; to know the Law relating to that Fact, or direct concerning it, as to know an Accident that hath no Subject.

Hence it follows, That the Judge can never direct what the Law is in any matter controverted, without first knowing the Fact; and then it follows, That without his previous knowledge of the Fact, the Jury cannot go against his Direction in Law, for he could not direct.

But the Judge, quâ Judge, cannot know the Fact possibly, but from the Evidence which the Jury have, but (as will appear) he can never know what Evidence the Jury have, and consequently he cannot know the matter of Fact, nor punish the Jury for going against their Evidence, when he cannot know what their Evidence is.

It is true, if the Jury were to have no other Evidence for the Fact, but what is depos'd in Court, the Judge might know their Evidence, and the Fact from it, equally as they, and so direct what the Law were in the Case, though even then the Judge and Jury might honestly differ in the result from the Evidence, as well as two Judges may, which often happens.

But the Evidence which the Jury have of the Fact is much other than that; For,

1. Being return'd of the Vicinage, whence the cause of Action ariseth, the Law supposeth them thence to have sufficient knowledge to try the matter in Issue (and so they must) though no Evidence were given on either side in Court, but to this Evidence the Judge is a stranger.

2. They may have Evidence from their own personal knowledge, by which they may be assur'd, and sometimes are, that what is depos'd in Court, is absolutely false; but to this the Judge is a stranger, and he knows no more of the Fact than he hath learn'd in Court, and perhaps by false Depositions, and consequently knows nothing.

3. The Jury may know the Witnesses to be stigmatiz'd and infamous, which may be unknown to the parties, and consequently to the Court.

4. In many Cases the Jury are to have View necessarily, in many, by consent, for their better information; to this Evidence likewise the Judge is a stranger.

5. If they do follow his direction, they may be attainted, and the Judgment revers'd for doing that, which if they had not done, they should have been fined and imprisoned by the Judge, which is unreasonable.

6. If they do not follow his direction, and be therefore fined, yet they may be attainted, and so doubly punish'd by different Judicatures for the same offence, which the Common Law admits not.

Chevin and  
Paramours  
Case, 3 El.  
Dyer 201. 2.  
n. 53.

The Progress  
in this Writ  
of Right till  
Judgment for  
Paramour the  
Defendant, is  
at large 13  
El. Dyer l.  
301. n. 40.

A fine revers'd in Banco Regis for Infancy, per inspectionem & per testimonium del. 4. fide dignorum. After upon Examination of divers Witnesses in Chancery, the suppos'd Infant was prov'd to be of Age, tempore finis levati, which Testimonies were exemplified, and given in Evidence after in Comuni Banco, in a Writ of Entry in the quibus there brought. And though it was the Opinion of the Court, that those Testimonies were of no force against the Judgment in the Kings Bench, yet the Jury found, with the Testimony in Chancery, against direction of the Court, upon a point in Law, and their Verdict after affirmed in an Attaint brought, and after a Writ of Right was brought, and battle joyn'd.

7. To what end is the Jury to be return'd out of the Vicinage, whence the cause of Action ariseth? To what end must Hundredors be of the Jury, whom the Law supposeth to have nearer knowledge of the Fact than those of the Vicinage in general? To what end are they challeng'd so scrupulously to the Array and Pole? To what end must they have such a certain Free-hold, and be probi & legales homines, and not of affinity with the parties concern'd? To what end must they have in many Cases the view, for their exacter information chiefly? To what end must they undergo the heavy punishment of the villanous Judgment, if after all this they implicitly must give a Verdict by the dictates and authority of another man, under pain of Fines and Imprisonment, when sworn to do it according to the best of their own knowledge?

A man cannot see by anothers Eye, nor hear by anothers Ear, no more can a man conclude or infer the thing to be resolv'd by anothers Understanding or Reasoning; and though the Verdict be right the Jury give, yet they being not assur'd it is so from their own Understanding, are forsworn, at least in foro conscientie.

9. It is absurd a Jury should be fined by the Judge for going against their Evidence, when he who fineth knows not what it is, as where a Jury find without Evidence in Court of either side, so if the Jury find, upon their own knowledge, as the course is if the Defendant plead Solvit ad diem, to a Bond prov'd, and offers no proof. The Jury is directed to find for the Plaintiff, unless they know payment was made of their own knowledge, according to the Plea.

14 H. 7. f. 29.  
per Vavasor  
in Camer.  
Sense, without  
contradiction  
Hob. f. 227.

And it is as absurd to fine a jury for finding against their Evidence, when the Judge knows but part of it; for the better and greater part of the Evidence may be wholly unknown to him; and this may happen in most Cases, and often doth, as in Graves and Shorts Case.

Error of a Judgment in the Common Bench, the Error assign'd was, The Issue being, whether a Feoffment were made: and the Jurors being gone together to confer of their Verdict, one of them shew'd to the rest an Escrow pro petentibus, not given in Evidence by the parties per quod, they found for the Demandant upon Demurrer adjudg'd no Error; for it appears not to be given him by any of the parties, or any for them, it must be intended he had it as a piece of Evidence about him before, and shew'd it to inform himself and his Fellows, and as he might declare it as a witness, that he knew it to be true. They resolv'd, If that might have avoided the Verdict, which they agreed it could not, yet it ought to have been done by Examination, and not by Error.

Graves vers.  
Short, 40 El.  
Cro. f. 616.

That Decantatum in our Books, Ad quæstionem facti non respondent Judices, ad quæstionem legis non respondent Juratores, literally taken is true: For if it be demanded, What is the Fact? the Judge cannot answer it: if it be asked, What is the Law in the Case, the Jury cannot answer it.

Therefore the parties agree the Fact by their pleading upon Demurrer, and ask the Judgment of the Court for the Law.

In Special Verdicts the Jury Inform the naked Fact, and the Court deliver the Law; and so is it in Demurrers upon Evidence, in Arrest of Judgments upon Challenges, and often upon the Judges Opinion of the Evidence given in Court, the Plaintiff becomes Nonsuit, when if the matter had been left to the Jury, they might well have found for the Plaintiff.

¶

But



But upon all general issues; as upon not Culpable pleaded in Trespass, Nil debet in Debt, Nul tort, Nul disseisin in Assize, Ne disturba pas in Quare Impedit, and the like; though it be matter of Law whether the Defendant be a Trespasser, a Debtor, Disseisor, or Disturber in the particular Cases in Issue; yet the Jury find not (as in a Special Verdict) the Fact of every Case by it self, leaving the Law to the Court, but find for the Plaintiff or Defendant upon the Issue to be tryed, wherein they resolve both Law and Fact complicateely, and not the Fact by it self; so as though they answer not singly to the Question what is the Law, yet they determine the Law in all matters, where Issue is joyn'd, and tryed in the principal Case, but where the Verdict is Special.

Hob.f.227.

To this purpose the Lord Hobart in Needler's Case against the Bishop of Winchester, is very apposite—Legally it will be very hard to quit a Jury that finds against the Law, either Common Law, or several Statute Law, whereof all men were to take knowledge, and whereupon Verdict is to be given, whether any Evidence be given to them or not. As if a Feoffment or Devise were made to one imperpetuum, and the Jury should find cross, either an Estate for Life, or in Fee-simple against the Law, they should be subject to an Attaint, though no man informed them what the Law was in that Case.

The legal Verdict of the Jury to be recorded, is finding for the Plaintiff or Defendant, what they answer, if asked to questions concerning some particular Fact, is not of their Verdict essentially, nor are they bound to agree in such particulars; if they all agree to find their Issue for the Plaintiff or Defendant, they may differ in the motives wherefore, as well as Judges, in giving Judgment for the Plaintiff or Defendant, may differ in the Reasons wherefore they give that Judgment, which is very ordinary.

I conclude with the Statute of 26 H. 8. c. 4. That if any Jurors in Wales do acquit any Felon, Murderer, or Accessary, or give an untrue Verdict against the King, upon the Tryal of any Traverse, Recognizance, or Forfeiture, contrary to good and pregnant Evidence ministred to them by persons sworn before the Kings Justiciar. That then such Jurors should be bound to appear before the Council of the Marches, there to abide such Fine or Ransome for their Offence, as that Court should think fit.

If Jurors might have been fined befoze, by the Law, for going against their evidence in matters criminal, there had been no cause for making this Statute against Jurors, for so doing in Wales only.

## Objections out of the Ancient and Modern Books.

1. A Juror kept his Fellow's a day and night, without any reason or assenting, and therefore awarded to the Fleet. <sup>8 Aff. pl. 35.</sup>

This Book rightly understood is Law, That he straid his Fellows a day and a night, without any reason or assenting, may be understood, That he would not in that time intend the Verdict at all, moze than if he had been absent from his Fellows, but wilfully not stand for either side: In this sense it was a Misemeanor against his Oath, For his Oath was truly to try the Issue, which he could never do, that resolv'd not to confer with his Fellows.

And in this sense it is the same with the Case <sup>34 E. 3. where</sup> Twelve being sworn, and put together to treat of their Verdict, one secretly withdrew himself, and went away, for which he was justly fined and imprison'd; and it differs not to withdraw from a mans duty, by departing from his Fellows, and to withdraw from it, though he stay in the same Room, and so is that Book to be understood. <sup>34 E. 3. Bra. Title Jurors n. 46.</sup>

But if a man differ in Judgment from his Fellows for a day and a night, though his dissent may not be as reasonable as the Opinion of the rest that agree, yet if his Judgment be not satisfied, one disagreeing can be no moze criminal than four or five disagreeing with the rest.

2. A Juror would not agree with his Fellows for two dayes, and being demanded by the Judges, If he would agree; said, He would first die in Prison; whereupon he was committed, and the Verdict of the Eleven taken; but upon better advice the Verdict of the Eleven was quash'd, and the Juror discharg'd without Fine, and the Justices said, the way was to carry them in Carts, until they agreed, and not by fining them; and as the Judges err'd in taking the Verdict of Eleven, so they did in imprisoning the Twelfth; and this Case makes strongly that the Juror was not to be fined, who disagreed in Judgment only. <sup>41 Aff. p. 11.</sup>

36 H.6. f.27.  
Br. Jurors.18.

Much of the Office of Jurors, in order to their Verdict, is ministerial, as not withdrawing from their Fellows, after they are sworn, not withdrawing after challenge, and being tryed in befoze they take their Oath, not receiving from either side Evidence after their Oath not given in Court, not eating and drinking befoze their Verdict, refusing to give a Verdict, and the like; wherein if they transgress, they are punishable; but the Verdict it self, when given, is not an Act ministerial, but judicial, and according to the best of their judgment, for which they are not punishable, nor to be punished, but by Attaint.

3. The Case of 7 R. 2. Title Corona Fitz. 108. was cited, where upon acquittal of a Common Thief, the Judge said, The Jury ought to be bound to his good behaviour, during his life: But saith the Book, quere per quel ley, but that was only gratis dictum by the Judge, for no such thing was done, as binding them.

Hob. f.114.

4. Bradshaw and Salmons Case was urged, where a Jury had given excessive Damages upon a Trial in an Action of Covenant, and the Court of Star-Chamber gave Damages to the Complainant almost as high as the Jury had given upon the Trial: But the Jury, who gave the Damages, were not questioned: Though, saith the Book, they might have been, because they receiv'd Briefs from the Plaintiff, for whom they gave Damages, which was a Misdemeanor; but the express Book is, That the Jury could not be punished by Information for the excessive Damages, but only by Attaint, therefore not for their false Verdict without other Misdemeanor; which answers some other Cases alledg'd.

Nor can any man shew (though it was said) That a Jury was ever punished upon an Information, either in Law, or in the Star-Chamber, where the charge was only for finding against their Evidence, or giving an untrue Verdict, unless Imbracery, Subordination, or the like, were joyn'd.

5. It was said, A Perjury in facie Curie is punishable by the Judge; and such is it if Jurors go against their Evidence, perhaps a Witness may be punished for Perjury in facie Curie (which I will not maintain to be Law) But a Jury can never be so punished, because the evidence in Court is not binding evidence to a Jury, as hath been shew'd.

6. Some

6. Some Records were cited, of Fines pro Conclamento; no doubt it is an Article inquirable in every Oyer and Terminer, and one Jury may find it upon another.

7. Braynes Case was urg'd, but the Jurors were there fined for a manifest Combination to delude the Court, by agreeing upon two Verdicts, and concealing the latter, if the Court would be satisfied with the former. 42 El. Cr. 778.

8. Wharton's Case, reported by two Reporters, Yelverton saith, That the Judges, whereof Popham was one, and a Privy Counsellor, were very angry, and fined the Jury for their Verdict, and finding against direction.

In those Reports that pass under the Name of Noy's, the same Case is reported with this, That the Judges conceiv'd the Jury had been unlawfully dealt with to give that Verdict; which, if true, the fining was lawful, and the Case therein reported, shott by Yelverton.

9. Wagstaff's Case, in the Kings Bench lately, was the same with the present Case; but by the Record it is reasonable to think the Jurors committed some fault besides going against their Evidence, for they were unequally fined.

But however, All the Judges having, upon this Return, resolv'd, That finding against the Evidence in Court, or Direction of the Court barely, is no sufficient Cause to fine; the Jury answers all these Cases, if not answered before.

10. There remains Southwell's Case, reported by Leonard, some Cases out of the Court of Wards in Lannoy's Case, reported by Serjeant Moore, f. 730. where Jurors were sent to the Fleet, or threaten'd to be sent, for not finding Offices according to direction of the Court. Lannoys C. Moore 730.

1. An Inquest of Office is not subject to an Attaint.

2. It neither determines any mans right, nor doth any party put any Tryal upon them.

3. They are only to find naked matter of fact; as the Books are of 3 H. 7. f. 10. b. and 2 H. 4. f. 5. a. but principally an Office for the King is in many Cases, as necessary, as an Entry for a common person, without which he can never come by, or try his right, nor can the King, without an Office, know whether he hath right to a Ward, a Mortmain, or the like; and as it is an injury to hinder a man from his Entry, whereby his right may be tryed, so it is not to find an Office for the King, whereby his right may be tryed, which concludes no man, but enables the King to a Tryal of his right, and in truth is only a finding of matter of fact, and no more. 3 H. 7. f. 10. b.  
2 H. 4. f. 5. a.

There.



Therefore perhaps it may be an Offence, as of a Witness refusing his Testimony, not to find an Office for the King, when clear proof is made of the matter of Fact; but if proof be not made at all, or be altogether doubtful, or that the matter be matter of Law, the Inquest may find an Ignoramus, which a Jury, upon a Trial, can never do: But of this I shall say no more, it concerning not the Case in question.

*Presidents.* That the Court of *Common Pleas*, upon *Habeas Corpus*, hath discharg'd Persons imprison'd by other Courts, upon the insufficiency of the Return only, and not for Priviledge.

5 Jac. Sir Anthony Roper, committed by the High Commission Court, discharg'd absolutely in the Common Pleas, as unlawfully committed and detain'd, without any mention of Priviledge.

George Milton, imprison'd for Contempt, scandalous Words of the Court, and convicted of Drunkenness; the Cause refused insufficient, and therefore dimittitur à Prisona, and the Goaler discharg'd of him; but he gave Bail to attend the pleasure of the Court.

4 Car. 1. Elizabeth Ash committed by the High Commission, pro lenocinio, in like manner discharg'd; the Cause being insufficient to detain her in Prison, or to hinder her from the priviledge of that Court, but no other mention of Priviledge put in Bail.

7 Jac. Richard Hayes, for refusing to do Penance, as injoyn'd, committed by the High Commission, the Cause judg'd insufficient to commit, but gave Bail as before; he demanded a Habeas Corpus by reason of Priviledge.

But it is to be observ'd, That Priviledge lies only where a man is Officer of the Court, or hath a prior suit in the Common Pleas depending, and is elsewhere arrested to answer, and molested; that he cannot prosecute his Suit, he is then priviledged justly, and without wrong, because his Prosecutor elsewhere might have sued, if he pleas'd, in the Common Pleas.

All Privilege is either for Officers, Clerks, or Attorneys of the Court, not to be sued elsewhere; or for persons impleading or impleaded, having priority of Suit in the Common Pleas, arrested or sued in other Jurisdictions; or for the Menial Servants of such Officers.

These Privileges are not detrimental to any, because whoever hath occasion to sue an Officer, or any other, having priority of Suit as before, is not restrained to sue them in the Common Pleas, but is restrained from suing elsewhere. And this is the true Privilege of the Court.

And the way of enjoying this Privilege, was, by Writs of Privilege to Superfede the proceeding of other Courts against such, who had the Privilege of the Common Pleas; as is yet ordinary in the Cases of Attorneys, Officers, and Clerks.

And in such Writs the cause of Privilege is mentioned, and as to their Menial Servants, if not true, may be Travers'd. As 22 H. 6. 38. Debt was brought against Baron and Feme, and a Superfedeas out of the Chancery, was cast for the Baron, as Menial Servant to an Officer of Chancery; whereupon the Plaintiff said it was contain'd in the Writ that the Husband was Menial Servant to R. J. del Chancery, whereas he was not his Menial Servant, and thereupon Issue was taken. But Quere of the Officers appearing of Record in the Court may be Travers'd.

21 H. 6. f. 20.  
22 H. 6. f. 38.  
34 H. 6. f. 15.

Vide Dyer  
12 El. f. 287.  
pl. 48.

Vid. the Superfedeas for Clerks of the Court, and for Attorneys anciently, and their great difference. Reg. Jud. f. 84. a. But now Attorneys are inroll'd as well as Officers.

Hence it follows, Though proceeding in other Courts against a person privileged in Banco, might be Superfeded, yet it was when the matter proceeded upon in such Courts, might as well be prosecuted in the Common Bench; But if a privileged person, in Banco, were sued in the Ecclesiastical Courts, or before the High Commission, or Constable and Marshal, for things whereof the Common Pleas had no Cognizance, they could not Superfede that proceeding by Privilege. And this was the ancient reason and course of Privilege.

1. Another way of Privilege, by reason of Suit depending in A Superiour Court, is, when a person impleading or impleaded, as in the Common Bench, is after arrested in a Civil Action or Plaint in London, or elsewhere, and by Habeas Corpus is brought to the Common Pleas, and the Arrest and Cause return'd; if it appear to the Court, That the Arrest in London was after the party ought to have had the Privilege of the Common Pleas; he shall have his Privilege allowed, and be discharge'd of his Arrest, and the party left to pro-

prosecute his cause of Action in London, in the Common Pleas, if he will.

2. If the cause of the Imprisonment retourn'd, be a lawful cause, but which cannot be prosecuted in the Common Pleas, as Felony, Treason, or some cause wherein the High Commission, Admiralty, or other Court, had power to imprison lawfully, then the party imprison'd, which did implead, or was impleaded in the Common Bench before such imprisonment, shall not be allow'd Privilege, but ought to be remanded.

3. The third way is, when a man is brought by Habeas Corpus to the Court, and upon retourn of it, it appears to the Court, that he was against Law imprison'd and detain'd, though there be no cause of Privilege for him in this Court, he shall never be by the Act of the Court remanded to his unlawful imprisonment, for then the Court should do an act of Injustice in imprisoning him, de novo, against Law, whereas the great Charter is, Quod nullus liber homo imprisonetur nisi per legem terræ; This is the present case, and this was the case upon all the Presidents produc'd and many more that might be produc'd, where upon Habeas Corpus, many have been discharg'd and bail'd, though there was no cause of Privilege in the Case.

This appears plainly by many old Books, if the Reason of them be rightly taken. For insufficient causes are as no causes retourn'd; and to send a man back to Prison for no cause retourn'd, seems unworthy of a Court.

9 H. 6. 54. 58.  
Br. n. 5.  
14 H. 7. f. 6.  
n. 19. 9 E. 4.  
47. n. 24.  
12 H. 4. f. 21.  
n. 11. Br.

If a man be impleaded by Writ in the Common Pleas, and is after arrested in London upon a Plaint, there upon a Habeas Corpus he shall have Privilege in the Common Pleas, if the Writ, upon which he is impleaded, bear date before the Arrest in London, and be retourn'd, although the Plaintiff in the Common Pleas be Nonsumt, essoin'd, or will not appear, and consequently the Case of Privilege at an end before the Corpus cum causa retourn'd; but if the first Writ be not retourn'd, there is no Record in Court that there is such a Defendant.

The like where a man brought Debt, in Banco, and after for the same Debt arrested the Defendant in London, and became Nonsumt in Banco; yet the Defendant, upon a Habeas Corpus, had his Privilege, because he had cause of Privilege at the time of the Arrest, 14 H. 7. 6. Br. Privilege, n. 19.

The like Case 9 E. 4. where a man appear'd in Banco, by a Cepi Corpus, and found Mainprise, and had a day to appear in Court, and before his day was arrested in London, and brought a Corpus cum causa in Banco Regis, at which day the Plaintiff became

came Nonfuit, yet he was discharg'd from the Serjeant at London, because his Arrest there was after his Arrest in Banco, and consequently unlawful, 9 E. 4. f. 47. Br. Priviledge 24. and a man cannot be imprison'd at the same time lawfully in two Courts.

Coke Mag.  
Chart. f. 43. &  
55.

The Court of Kings Bench cannot pretend to the only discharging of Prisoners upon Habeas Corpus, unless in case of Priviledge, for the Chancery may do it without question.

And the same Book is, That the Common Pleas or Exchequer may do it, if upon Return of the Habeas Corpus, it appear the Imprisonment is against Law.

An Habeas Corpus may be had out of the Kings Bench or Chancery, though there be no Priviledge, &c. or in the Court of Common Pleas, or Exchequer, for any Officer or priviledg'd Person there; upon which Writ the Gaoler must Return by whom he was committed, and the cause of his Imprisonment; and if it appeareth that his Imprisonment be just and lawful, he shall be remanded to the former Gaoler; but if it shall appear to the Court that he was imprisoned against the Law of the Land, they ought, by force of this Statute, to deliver him; if it be doubtful and under consideration, he may be bayl'd. — The Kings Bench may bayl, if they please, in all cases; but the Common Bench must remand, if the cause of the Imprisonment return'd be just.

Mic. C. 2.  
Coke f. 55.

The Writ de homine replegiando, is as well returnable in the Common Pleas, as in the Kings Bench.

All Prohibitions for inroaching Jurisdiction Issue as well out of the Common Pleas as Kings Bench.

Quashing the Order of Commitment upon a Certiorari, which the Kings Bench may do, but not the Common Pleas, is not material in this Case.

1. The Prisoner is to be discharg'd or remanded barely upon the Return, and nothing else, whether in the Kings Bench, or Common Pleas.

2. Should the Kings Bench have the Order of Commitment certified and quash'd, before the Return of the Habeas Corpus, or after, what will it avail the Prisoners; they cannot plead Nul tiel Record, in the one case or the other.

3. In all the Presidents shew'd in the Common Pleas, or in any that can be shew'd in the King's Bench, upon discharging the Prisoner by Habeas Corpus, nothing can be shew'd of quashing the Orders or Decrees of that Court, that made the wrong Commitment.



Glanvill's C.  
Moore f. 836.

4. It is manifest, where the Kings Bench hath, upon Habeas Corpus, discharg'd a Prisoner committed by the Chancery, the person hath been again re-committed for the same Cause by the Chancery, and re-deliver'd by the Kings Bench; but no quashing of the Chancery Order for Commitment ever heard of.

5. In such Cases of re-commitment, the party hath other and proper remedy besides a new Habeas Corpus; of which I shall not speak now.

6. It is known, That if a man recover in Assise, and after in a Re-disseisin, if the first Judgment be revers'd in the Assise, the Judgment in the Re-disseisin is also revers'd. So if a man recover in Waste, and Damages given, for which Debt is brought (especially if the first Judgment be revers'd before Execution) it destroys the Process for the Damages in Debt, though by several Originals. But it may be said, That in a Writ of Error in this kind, the foundation is destroy'd, and no such Record is left.

Drury's Case  
8. Rep.

But as to that in Drury's Case, 8. Rep. an Outlawry issued, and Process of Capias upon the Outlawry, the Sheriff return'd, Non est inventus; and the same day the party came into Court and demanded Oyer of the Exigent, which was the Warrant of the Outlawry; and shew'd the Exigent to be altogether uncertain and insufficient, and consequently the Outlawry depending upon it to be null. And the Court gave Judgment accordingly, though the Record of the Outlawry were never revers'd by Error; which differs not from this Case, where the Order of Commitment is Judicially declar'd illegal, though not quash'd or revers'd by Error, and consequently whatever depends upon it, as the Fine and Commitment both, and the Outlawry in the former Case was more the Kings Interest, than the Fine in this.

The Chief Justice deliver'd the Opinion of the Court, and accordingly the Prisoners were discharg'd.

*Hil.*

*Hill. 23 & 24 Car. II. B. C. Rot. 615.*

*Edmund Sheppard Junior, Plaintiff, In Trespass, Suff. ff.  
against George Gofnold, William Booth, William Hay-  
gard, and Henry Heringold, Defendants.*

**T**HE Plaintiff declares for the forcible taking and carrying away, at Gyppin in the said County, the Eight and twentieth of January, 22 Car. 2. Five and twenty hundred and Three quarters of a hundred of Wax of the said Edmunds there found, and keeping and detaining the same under Arrest, until the Plaintiff had paid Forty nine Shillings to them the said Defendants, for the delivery thereof, to his Damage of 40 l.

The Defendants plead Not Culpable, and put themselves upon the Country, &c. The Jury find a Special Verdict.

1. That before the Caption, Arrest and Detention of the said Goods, and at the time of the same, Edmund Sheppard the younger, was, and is Lord of the Mannor of Bawdsey in the said County, and thereof leis'd in his Demesne, as of Fee, and that he, and all those whose Estate he hath, and had at the time of the Trespass, suppos'd in the said Mannor, with the Appurtenances, time out of mind had, and accustomed to have all Goods and Chattels wreck'd upon the high Sea, cast on Shore upon the said Mannor, as appertaining to the said Mannor.

2. They further say, The said Goods were shipped in Foreign parts, as Merchandise, and not intended to be imported into England, but to be carried into other Foreign parts.

3. That the ſaid Goods were wreck'd upon the high Sea, and by the Sea-ſhoar, as wreck'd Goods caſt upon the Shoar of the ſaid Mannor, within the ſame Mannor, and thereby the ſaid Edmund ſeis'd as wreck, belonging to him as Lord of the ſaid Mannor.

They further find, That at the Parliament begun at Weſtmiſter the Five and Twentieth of April, the Twelfth of the King, and continued to the Nine and Twentieth of December following, there was granted to the King a Subſidy, call'd Poundage.

Of all Goods and Merchandiſes of every Merchant, natural born Subject, Denizen, and Alien, to be exported out of the Kingdom of England, or any the Dominions thereto belonging, or imported into the ſame by way of Merchandiſe, of the value of Twenty ſhillings, according to the particular Rates and Values of ſuch Goods and Merchandiſes, as they are reſpectively rated and valued in the Book of Rates, intitled, The Rates of Merchandiſe, after in the ſaid Act mentioned and referr'd to, to One ſhilling, &c.

Then they ſay, That by the Book of Rates, Wax inward, or imported, every hundred weight containing One hundred and twelve pounds, is rated to Forty ſhillings, and hard Wax the pound Three ſhillings four pence.

They find, at the time of the Seizure of the Goods, That the Defendants were the King's Officers, duly appointed to collect the Subſidy of Poundage, by the ſaid Act granted; and that for the Duty of Poundage, not paid at the ſaid time, they ſeis'd and arreſted the ſaid Goods, until the Plaintiff had paid them the ſaid Fine of Forty nine ſhillings.

But whether the Goods and Chattels aforeſaid, ſo as aforeſaid wreck'd, be chargeable with the ſaid duty of Poundage, or not, they know not?

And if not, They find the Defendants Culpable, and Aſſeſs Damages to the Plaintiff to Nine and forty ſhillings, ultra miſas & cuſtagia.

And if the ſaid Goods be chargeable with the ſaid Duty, they find the Defendants not Culpable.

It is clear, That formerly in the times of Henry the Eighth, Queen Mary, and Queen Elizabeth, it was ſuppos'd that ſome Cuſtomes were due by the Common Law (wherein the King had an Inheritance) for certain Merchandize to be tranſported out of the Realm; and that ſuch Cuſtomes were not originally due by any Act of Parliament: ſo is the Book 31 H. 8. Dyer 31 H. 8.  
45. b. n. 22.

It was the Opinion likewise of all the Juſtices in the Chequer Chamber, when Edward the Sixth had granted to a Merchant Alien, That he might Tranſport or Import all ſorts of Merchandize, not exceeding in the value of the Cuſtomes and Subſidies thereof Fifty pounds, paying only to the King, his Heirs and Succeſſors, pro Cuſtumis, Subſidiis, & oneribus quibuſcunque, of ſuch Merchandizes, ſo much, and no more, as any Engliſh Merchant was to pay.

That this Patent remained good for the old Cuſtomes, wherein the King had an Inheritance by his Prerogative, but was void by the Kings death, as to Goods cuſtomable for his life only, by the Statute of Tunnage, &c. Dyer 1 Mar.  
f. 92. a. n. 17.

So upon a Queſtion rais'd upon occaſion of a new Impoſition laid by Queen Mary upon Clothes, the Judges being conſulted about it 1 Eliz. The Book is, Dyer 1 Eliz.  
f. 165. a. b. n. 57

Nota, That Engliſh Merchants do not pay at Common Law any Cuſtome for any Wares or Merchandizes whatever, but Three, that is, Woolles, Woolfells, and Leather; that is to ſay, pro quolibet ſacco lanæ continent. 26 pierres, & cheſcun pierr 14 pound, un demy marke, and for Three hundred Woolfells half a Mark, and for a Laſt of Leather Thirteen ſhillings four pence, and that was equal to Strangers and Engliſh Merchants.

This was, in thoſe ſeveral Reigns, the Opinion of all the Judges of the times; whence we may learn how ſalutiferous even the Opinion of all the Judges is, when the matter to be reſolved muſt be clear'd by Searchers not common, and depends not upon Caſes vulgarly known by Readers of the Year Books.

For ſince theſe Opinions, it is known, thoſe Cuſtomes called the Old, or Antiqua Cuſtoma, were granted to King Edward the Firſt, in the Third year of his Reign, by Parliament, as a new thing, and was no Duty belonging to the Crown by the Common Law.

But



But the Act of Parliament it self, by which this custome was granted, is nowhere extant now, but undeniable Evidence of it appears.

For King Edward the First, by his Letters Patents, Dated November, the Third of his Reign, reciteth, Cum Prælati, Magnates, & tota communitas quandam novam consuetudinem nobis, & hæredibus nostris de Lanis, Pellibus & Coriis, viz. de sacco Lanæ dimidium Marcæ de 300 pellibus dimidium Marcæ, & de lasto Corii 13 s. 4 d. concesserint, &c. whence Sir Edward Coke rightly observes, the Grant was to Edward the First himself, and his Heirs, from the words, Nobis & hæredibus nostris, in the Patent.

Coke Mag.  
Chart. c. 30.  
f. 58. 59.

2. That no such Custome was before, from the words, quandam novam custumam, and some other pertinent Observations he makes.

And he cites the year of the Letters Patents truly, to be the Third year of Edward the First, which was the year of the Statute of Westminster the First; but he makes the Date of the Letters Patents to be November the Tenth of that year, which in truth was November the Fifteenth: He cites likewise the Patent Rolls of Edward the First, for it M. 1. but omits the n, which is n. 1. also: He also cites the Fine Roll of 3 E. 1. to the same purpose, M. 26.

Rot. Pat. 3 E. 1.  
M. 1. n.  
Rot. finium  
3 E. 1. M. 24.

But his citation differs in remarkable things from the Patent Roll, 3 E. 1. which runs, Cum Prælati & Magnates, & tota communitas Mercatorum Regni nostri, and not tota Communitas, nobis concesserint quandam novam consuetudinem de lanis, pellibus, & Coriis, tam in Anglia, quam in Hibernia, & Wallia, Regnum nostrum exentibus (which are omitted also in Sir Edward Coke) in perpetuum nobis, & hæredibus nostris capiendam sicut in forma inde provisæ, & communiter concessa plenius continetur; and the particulars are mentioned of the Grant.

It appears by the Preface of it, the Statute of Westminster the First was made 3 E. 1. A son primer Parliament general apres son coronement, lendemain de la clause de Paschæ, that is on the Sunday of Easter utas, in the Third year of his Reign; so as there was no Parliament of Edward the First before this his Third year. The antique custumæ upon Wools, Woolfells, and Leather, were granted to Edward the First, by Parliament, as appears both by the Patent, and Fine Rolls of 3 E. 1. Dated November the Fifteenth, which must be by a Parliament before the Date of the Letters Patents; whence it follows,

lows they were granted by the Statute of Westminster the First, or by the same Parliament, and probably therefore it was by a Rider (as Proviso's now usually are) annex'd, by tacking to the Bill of Law of Westminster the First, and from it after casually lost.

So as it is now clear, That Antiqua Custuma, upon Wools, Pells, and Leather was not by the Common Law, but by Act of Parliament 3 E. 1.

And if any scruple remain'd of a power at Common Law to charge Merchandise in any other manner, the Act of the Twelfth of the King, which grants him Tunnage and Poundage, clears it from question in these words, And because no Rates can be imposed upon Merchandise Imported or Exported by Subjects or Aliens, but by common consent in Parliament, it Enacts that Rates upon Merchandise shall be according to the Book of Rates, established by the Act, &c.

Upon this Supposition, That by the Common Law Merchandise might be charged with Custome, as Wools, Pells, and Leather were. Queen Mary by her Absolute Prerogative, laid an Imposition of Fourteen pence upon a Cloath Transported by Natives, and One and twenty pence by Strangers, as appears in Dyer, 1 Eliz. Dyer 1 Eliz.  
f. 165. b.

And upon the same ground King James, about the Twelfth of his Reign, laid an Imposition upon Currans: but these obtain'd not for Law; and so possibly like Impositions might be laid on Wax, or any other Merchandise, but no such were laid de facto, unless by the Grants of Tunnage and Poundage to the Kings for life by Parliament.

Now is it a true Inference, That if the Antiqua Custumæ were at Common Law (as every thing in one sense is taken for Common Law, if it be Law, when it appears not to be by Act of Parliament) therefore it was by Arbitrary Imposition of the King, for it might be by Act of Parliament not extant, as this of 3 E. 1. and in truth, most of the Common Law cannot be conceived to be Law otherwise than by Acts of Parliament, or Power equivalent to them, whereof the Rolls are lost; for alwayes there was a power and practise of making new Laws.

1. But it is not pretended that any Custome is laid upon Wax in any manner by the Common Law, nor by Statute, but by that of Tunnage and Poundage the Twelfth of this King.

2. This

2. This Seizure and Arrest appears by the Special Verdict to be for Poundage, according to the Book of Rates, by the Statute made the Twelfth of the King, cap. 4. which gives Two Shillings to the King for every hundred weight of Wax, and therefore not for any other Duty.

West. 1. c. 4.  
Vid. Stat.

3. At the Common Law, wreck'd Goods (as these are found to be) could not be chargeable with Custome (if other Goods were) for at the Common Law all wreck was wholly the Kings, and he could not have a small Duty of Custome out of that which was all his own: And by Westminster the First, where wreck belongeth to another, than to the King, he shall have it in like manner, that is, as the King hath his.

It remains clear then, That Wax is a Merchandise subject to pay the duty of Poundage by, and according to, the Act of the Twelfth of this King, and not otherwise.

The Question then before us (being narrow'd) will be, Whether Wax, or any other Goods subject to the Duty of Tunnage and Poundage by the Act and Book of Rates, the Twelfth of the King, ship'd in Foreign parts, as Merchandise, not intended for England, but for other Foreign parts, proving to be wreck, and cast by the Sea upon a Mannor, to which wreck belongs by Prescription, ought to answer the Duty of Tunnage and Poundage, as if Imported, as Merchandise, in Ships, and not as wreck; for if any kind of Merchandise wreck'd, be subject to the Duty, all Merchandise mentioned in the Book of Rates is?

To resolve this Question I shall observe, That all wreck cast on Shoar in the Kingdom, must be conceived as Goods Imported; for though Goods Exported may be wreck'd at Sea equally as Goods to be Imported, yet Goods Exported, if wreck'd, are not cast upon any Shoar of the Kingdom as wreck, under the notion of being Exported, but under the notion of being some way Imported.

So as in this Question of wreck, to speak of any Goods or Merchandise, quatenus Exported, will be useless.

And because the Resolution of this Case depends upon the words and intendment of the Act of Twelfth of the King, c. 4. And that if any Merchandise in kind, subject to the Duties by that Act, proving wreck, cast on Shoar, may be charg'd with the Duty, every Merchandise within the Act, proving wreck, will be charg'd with it; and if any wreck'd Goods be free, all wreck'd Goods are free; for the Act makes no difference in the kinds or species of the Merchandise.

I shall therefore recite some Clauses of the Act. The first <sup>12 Car.2. c.4</sup> is, That there is given to the King, of every Tun of Wine of the growth of *France*, or of any the Dominions of the French King, that shall come into the Port of *London*, and the Members thereof by way of Merchandise by your natural born Subjects, the Sum of Four pounds and Ten shillings, of currant English mony, and so after that rate. And by Strangers and Aliens, Six pounds of like mony.

And of every Tun of like Wines, which shall be brought into all and every the other Ports and Places of this Kingdom, and the Dominions thereof, by way of Merchandise, by your natural born Subjects, the Sum of Three pounds; and by Aliens Four pounds and Ten shillings.

From those words I observe, That Wines liable to pay Tunnage by the Act; must have these properties.

1. They must be Wines which shall come, or be brought into the Ports and Places of the Kingdom.

2. They must come, or be brought into such Ports or Places, as Merchandise, that is for sale, and to that end; for no other conception can be of Goods brought as Merchandise.

3. They must come and be brought as Merchandise, and for sale, by the Kings natural born Subjects, or by Strangers and Aliens, as distinguish'd from the natural Subjects.

4. The Duty payable to the King, is to be measur'd by the quality of him that imports the Commodity; that is, if the Importer be a natural Subject, he pays less to the King, and if an Alien, more.

5. All those Wines, charg'd with the Duty by the Act, so to come or be brought into the parts or places of the Kingdom, are to be Forraign; As of the growth of *France*, the *Levant*, *Spain*, *Portugal*, *Rhenish Wines*, or of the growth of *Germany*.

1. Whence it follows, That Wines of Forraign growth, and which by their kind are to pay Duty, if they shall come or be brought into the parts or places of the Kingdom, neither by the Kings natural Subjects, nor by Aliens, they are not chargeable with the Duties of this Act.

2. If they be not brought into the Ports and Places of the Kingdom as Merchandise, viz. for sale, they are not chargeable with the Duty.



But Wines, or other Goods, coming, or brought into the Realm, as wreck, are neither brought into the Kingdom, by any the Kings natural Subjects, nor by any Strangers, but by the Wind and Sea, for such Goods want a Proprietor, until the Law appoints one.

3. Wreck'd Goods are not brought into the Kingdom, being cast on shore, as Merchandise, viz. for sale, but are as all other the Native Goods of the Kingdom, indifferent in themselves for sale, or other use, at the pleasure of the Proprietor.

4. All Goods Forraign or Domestique, are in their nature capable to be Merchandise, that is, to be sold; but it follows not thence, That wheresoever they are brought into the Kingdom, they are brought as Merchandise, and to be sold, or should pay Customs, for they are transfer'd from place to place, more for other uses than for sale.

Not are Goods which are brought to the Markets of the Kingdom to the end to be sold, therefore to pay Customs; for so all the Goods of the Kingdom would be customable: but they must be Goods brought ab extra, within the intention of the Act, or for Exportation to be carried out of the Kingdom.

5. All Goods charg'd with the Duties of the Act, must be proprieted by a Merchant natural born, or Merchant Alien, and the greater or less Duty is to be paid, as the Proprietor is an Alien or Native Merchant; for so are the words of the Act in the Clause for Poundage of all manner of Goods and Merchandise of every Merchant natural born Subject, Denizen and Alien, to be brought into the Realm, of the value of every Twenty shillings of the same Goods, according to the Book of Rates.

But wreck'd Goods are not the Goods of any Merchant natural born, Alien or Denizen, whereby the Duty payable should be either demanded, distinguisht, or paid.

Therefore a Duty impossible to be known, can be no Duty; for civilly what cannot be known to be, is as that which is not.

And it is a poor shift to say, The Lord of the Manor, who hath the wreck, is Merchant Proprietor; for if so, I ask, Is he an Alien Merchant Proprietor, or a Native?

If he be a natural Subject (as he must be, having his Mannor) he cannot be an Alien, and consequently the King can have no Alien Duty of wreck'd Goods, but Goods intended by the Act to be charg'd with the Duty, might be indifferently the Goods of Aliens or Natives: But to clear this more, put the Case

The Act had only charg'd Merchandise imported by Aliens, and not by Natives, with the Duty;

Then the King could have had no Duty from wreck'd Goods at all, for they could not be the Goods of an Alien Merchant; Nor is wreck brought into the Mannor by the Lord, more than a Waif or Estray is, which if brought thither by him, is no Waif or Estray.

Besides, it is clear, The Lord of a Mannor is no more a Merchant, Native or Alien, by reason of the property he hath in wreck Goods, than he is a Merchant, Native or Alien, by the property he hath in his Horses or Cows; for his property in a wreck is not qua Merchant of any kind, but qua Lord of his Mannor; and every Proprietor of Goods, by what Title soever, is as much Merchant as he.

6. All Goods subject to the Duty of Tunnage and Poundage, may be forfeited by the Disobedience and Misbehaviour of the Merchant Proprietor, or those trusted by him, by the Act: The words are, If any Merchandise, whereof the Subsidies aforesaid shall be due, shall at any time be brought from the parts beyond the Sea into any Port, Place, or Creek of this Realm, by way of Merchandise, and unshipped to be laid on Land, the Duties due for the same, not paid, nor lawfully tender'd, nor agreed for, according to the true meaning of this Act, then the same Goods, and Merchandises shall be forfeit to your Majesty.

1. But wreck'd Goods cannot be imported into any Creek or Place of the Realm, by way of Merchandise, and unshipped to be laid on Land; for if so imported and unshipped, to be laid on Land, it is no wreck, and therefore are not Goods forfeitable by the Misbehaviour of any within the Act, and consequently not Goods intended to be charged with the Duties by the Act.

2. By this Clause the Owner or Proprietor of Goods chargeable with the Kings Duty, is to pay or agree for the Duty with the Customers before the unshipping or landing of the Goods, else they are forfeited.

*Et sunt alia  
quodam quæ in  
multis bonis  
esse dicuntur  
sicut W. cum  
March, grossus  
piscis, &c.  
Bract. l. 3. de  
Coron. f. 120.  
c. 3. n. 4.  
Constables C.  
3. Rep. f.  
108. b.*

But wreck'd Goods are cast on Land, and consequently landed, having no Owner or Proprietor, and therefore the Duty impossible to be paid or agreed for, before their landing, and when so landed, and not before, the Law makes the King, or Lord of the Mannor their Proprietor, but not fully neither, until after a year and a day allowed to the first Owners to claim them, if any such be, by Stat. Westminster the First, c. 4.

Thence it follows, That wrecks should be rather forfeited to the King (which is not pretended) as Goods landed (the Kings Duty not paid or agreed for) then seized until payment were according to the Act.

3. By this Clause, Imported Goods, intended to be charg'd by the Act, are Goods to be brought from the parts beyond the Seas.

And therefore also wreck'd Goods are not to pay the Duty for the Native Commodities of the Kingdome Shipwrackt in their passage by Sea, for Exportation, may be Imported into the Realm as wreck, yet never brought from the parts beyond the Sea, as the Clause intends Goods charg'd should be.

4. Goods cast into the Sea to unburthen a Ship in a storm, and never intended for Merchandise, are wreck, when cast on shore without any Shipwrack.

*Bract. l. 2.  
f. 41. b.*

5. Goods derelict, that is, deserted by the Owners, and cast into the Sea, which happens upon various occasions, as coming from infected Towns or Places, and for many other respects, will be wreck if cast on shore afterwards, though never purpos'd for Merchandise; (But Goods cast overboard to lighten a Ship, are not by Bracton, nor from him in Sir H. Constables Case, esteemed Goods derelict; which is a Question not thoroughly examined) Si autem ea mente ut nolit esse Dominus, aliud erit per Bract.

*Bract. l. 2. f. 41.  
b. n. 3.  
Constables C.  
3. Rep.  
Bract. l. 3. de  
Coron. c. 3. n. 5  
f. 120. a.  
more fully.*

But by all the Clauses of the Act, Goods Imported into the Realm as Merchandise only, are to pay the Kings Subsidy, therefore not wreck Imported, and not as Merchandise.

6. If a Law were made, That Hozles and Oren, brought to Market to be ſold, ſhould pay the King a Poundage of their value, and a Hozle or Dr coming to Market, happen to ſtray, and be ſels'd in a Mannor that had Strapes, and there us'd according to the Law for Strapes, until a year and a day were paſt, without claim of the Owner, whereby the property of the Hozle or Dr was alter'd, and the Lord of the Mannor had gain'd it; will any man ſay Poundage ſhould be paid for this Hozle or Dr to the King, for being brought to Market to be ſold? and the Caſe is the ſame, or harder, to pay Poundage for wreck.

It remains that ſome Objections be clear'd;

First, It is ſaid, That by fraud of the Merchant or his Agents, and the Lord of the Mannor, Goods not ſhipwrackt at all may be caſt overboard, ſo as to be caſt on ſhoar on the Mannor by the Tide, and ſo the Kings Duty avoided by confederacy.

1. This Suppoſal is remote, and cannot be of ſome wrecks poſſible; as of wrecks of dereliſted Goods, or of Goods caſt into the Sea to unburthen a Ship.

2. If the fraud appear, there is no wreck, and the King will be righted. But to charge a legal property which the Lord of the Mannor hath in a wreck with payments, becauſe a fraud may be poſſible, but appears not, will deſtroy all property, for what appears not to be, muſt be taken in Law as if it were not.

The Second Objection is, That the Kings Officers by uſage have had in ſeveral Kings times, the Duties of Tunnage and Poundage from wrecks.

1. We deſired to ſee ancient Preſidents of that uſage, but could ſee but one in the time of King James, and ſome in the time of the laſt King, which are ſo new that they are not conſiderable.

2. Where the penning of a Statute is dubious, long uſage is a juſt medium to expound it by; For Jus & Norma loquendi is govern'd by uſage. And the meaning of things ſpoken or written muſt be, as it hath conſtantly been receiv'd to be by common Acceptation.

But



But if usage hath been against the obvious meaning of an Act of Parliament, by the Vulgar and Common Acceptation of the Words, then it is rather an Oppression of those concern'd, than an Exposition of the Act, especially as the usage may be circumstanc'd.

As for instance, The Customers seize a mans Goods, under pretence of a Duty against Law; and thereby deprive him of the use of his Goods, until he regains them by Law, which must be by engaging in a Suit with the King rather than do so, he is content to pay what is demanded for the King. By this usage all the Goods in the Land may be charg'd with the Duties of Tonnage and Poundage; for when the Concern is not great, most men (if put to it) will rather pay a little wrongfully, than free themselves from it over-chargeably.

And in the present Case, The genuine meaning of the words and purpose of the Act, is not according to the pretended usage, but against it, as hath been shew'd: Therefore usage in this Case weighs not.

The Third Objection is from the words Imported and brought into the Realm, or Dominions thereof, and that wrecks are Goods and Merchandises imported into the Realm, and therefore chargeable with the Duty.

There are no Goods (as hath been said) but may in a sense be termed Merchandise, because all Goods may possibly be sold, and when sold, or intended to be, they are Merchandise; and in that sense wreck'd Goods are Merchandise, and so are all Goods else.

It is also true, That the Goods in question are by the Act said to be shipped in Forraign parts, as Merchandise, but not intended to be brought into England, but to be carried to some other Forraign parts (so are the words).

But by the words, or some other Forraign parts, they might be intended to be carried as Merchandise into some Forraign parts, which are of the Kings Dominions, or of the Dominions of the Kingdom of England, for the Act mentions both.

And the Act limits the Duty, not upon Goods in the former sense, but upon Goods brought by way of Merchandise, by Natives or Aliens into any the Kings Dominions, which must be intended his Dominions, as of the Crown of England, for nothing could be enacted here concerning his Dominions, not of the Crown of England.

But

But the Axiom is uncertain, Whether they were to be carried to Forraign parts of the Dominions of England, or into parts not of the Dominion of England; nor follows it, becauſe Goods were intended to be ſold (that is, as Merchandiſe) in a place where good market was for them, that they were intended to be ſold at any other place, where no profit could be made, or not ſo much, or where ſuch Goods were perhaps prohibited Commodities; therefore the words of the Axiom, brought as Merchandiſe, muſt mean that the Goods are for Merchandiſe at the place they are brought unto.

And Goods brought or imported any where as Merchandiſe, or by way of Merchandiſe, that is, to be ſold, muſt neceſſarily have an Owner to let and receive the price for which they are ſold, unleſs a man will ſay, That Goods can ſell themſelves, and let and receive their own prices.

But wreck Goods imported or brought any where, have no Owner to ſell or price them at the time of their importation, and therefore are not brought by way of, or as Merchandiſe to England, or any where elſe.

Secondly, Though in a looſe ſenſe, inanimate things are ſaid to bring things; as, in certain Seaſons, Rain to bring Graſs; in other Seaſons, ſome Winds to bring Snow and Froſt; ſome Storms to bring certain Fowl and Fiſh upon the Coaſts.

Yet when the bringing in or importing, or bringing out and exporting, hath reference to Axioms of Deliberation and Purpoſe, as of Goods for ſale, which muſt be done by a rational Agent, or when the thing brought, requires a rational bringer or importer; as be it a Meſſage, an Answer, an Accompt, or the like. No man will ſay, That things to be imported or brought by ſuch deliberative Agents, who muſt have purpoſe in what they do, can be intended to be imported or brought by caſual and inſenſible Agents, but by Perſons, and Mediums, and Instruments, proper for the actions of reaſonable Agents.

Therefore we ſay not, That Goods drown'd or loſt in paſſing a Ferry, a great River, an arm of the Sea, are exported, though carried to Sea; but Goods exported are ſuch as are convey'd to Sea in Ships, or other Naval Carriage of mans Artifice; and by like reaſon Goods imported, muſt not be Goods imported by the Wind, Water, or ſuch inanimate means, but in Ships, Veſſels, and other Conveyances uſed by reaſonable Agents; as Merchants, Partners, Sailors, &c. whence I conclude, That Goods or Merchandiſe imported with in the meaning of the Axiom, can only be ſuch as are imported with  
deſibe-

deliberation, and by reasonable Agents, not casually, and without reason; and therefore wreck'd Goods are no Goods imported within the intention of the Act, and consequently not to answer the Kings Duties; for Goods, as Goods, cannot offend, forfeit, unlade, pay Duties, or the like, but men whose Goods they are. And wreck'd Goods have not Owners to do these Offices, when the Act requires they should be done; Therefore the Act intended not to charge the Duty upon such Goods.

Judgment for the Plaintiff. The Chief Justice delivered the Opinion of the Court.

*Hill. 23 & 24 Car. II. C. B. Rot. 695.*

*Richard Crowley* Plaintiff, In a Replevin, against *Thomas Swindles, William Whitehouse, Roger Walton*, Defendants.

**T**H E Plaintiff declares, That the Defendants the Thirtieth of December, 22 Car. 2. at Kings Norton, in a place there called Hurley field, took his Beasts, four Cows and four Heifers, and detain'd them, to his damage of Forty pounds.

The Defendants defend the Force; And as Bailiffs of Mary Ashenhurst, Widow, justify the Caption; and that the place contains, and did contain when the Caption is suppos'd, Twenty Acres of Land in Kings Norton aforesaid.

That long befoze the Caption, one Thomas Greaves Esquire, was seisd of One hundred Acres of Land, and of One hundred Acres of Pasture in Kings Norton aforesaid, in the said County of Worcester; whereof the Locus in quo is, and at the time of the Caption, and time out of mind, was parcel in his demesne, as of Fee, containing Twenty Acres.

That he long befoze the Caption, that is, 18 die Decemb. 16 Car. 1. at Kings Norton aforesaid, by his Indenture in writing under his Seal, which the Defendants produce, dated the said day and year, in consideration of former Service done by Edmond Ashenhurst to him the said Thomas, did grant by his said Writing to the said Edmond, and Mary his Wife, one yearly Rent of Twenty pounds, issuing out of the said Twenty Acres, with the Appurtenances, by the name of all his Lands and Hereditaments, situate in Kings Norton aforesaid.

Habendum the said Rent to the said Edmond and Mary, and their Assigns, after the decease of one Anne Greaves, and Thomas Greaves, Uncle to the Grantor, or either of them, which first should happen, during the lives of Edmond and Mary, and the longer liver of them, at the Feasts of the Annunciation of the blessed Virgin Mary, and St. Michael the Arch angel, by equal portions: The first payment to begin at such of the said Feasts as should first happen next after the decease of the said Anne Greaves, and Thomas the Uncle, or either of them.

A a

That



That if the Rent were behind in part or in all, it should be lawful for the Grantees, and the Survivor of them, to enter into all and singular the Lands in King's Norton of the Grantor, and to distrain and detain until payment. By vertue whereof the said Edmond and Mary became leis'd of the said Rent in their Demesne, as of Free hold, during their Lives, as aforesaid.

The Defendants say further in Fact, That after, that is to say, the last day of February, in the Two and twentieth year of the now King, the said Anne Greaves, and Thomas the Uncle, and Edmond the Husband, died at King's Norton.

That for Twenty pounds of the said Rent for one whole year, ending at the Feast of Saint Michael the Arch-Angel, in the Two and twentieth year of the King, unpaid to the said Mary, the Defendants justify the Caption, as in Lands, subject to the said Mary's Distress, as her Bailiffs; And aver her to be living at King's Norton aforesaid.

The Plaintiff demands Oyer of the Writing Indented, by which it appears, That the said Annuity was granted to Edmond and Mary, and their Assigns, in manner set forth by the Defendants in their Conuzance.

But with this variance in the Deed; And if the aforesaid yearly Rents of Ten pounds, and of Twenty pounds, shall be unpaid at any the daies aforesaid, in part or in all, That it shall be lawful for the said Edmond and Mary, at any time during the joynt natural Lives of the said Anne Greaves, and Thomas Greaves the Uncle, if the said Edmond and Mary, or either of them, should so long live, and as often as the said Rents of Twenty pounds, or any parcel should be behind, to enter into all the said Thomas Greaves the Grantors Lands in King's Norton aforesaid, and to Distrain.

Upon Oyer of which Indenture, the Plaintiff demurs upon the Conuzance.

Two Exceptions have been taken to this Conuzance made by the Defendants.

The first, for that it is said, The Rent was granted out of the Twenty Acres, being the Locus in quo, by the Name of all the Grantors Lands and Hereditaments in King's Norton, and that *a per women* in that Case is not good.

The

The Case of Grey and Chapman was urg'd, where by Indenture S. one Prudence Cousin let a House, and Twenty Acres of Land, by the Name of all her Tenements in S. But it was not alledg'd in what Vill the Acres were. 43 Eliz. Cro.  
f. 322.

The Court was of Opinion in Arrest of Judgment, that the naming of the Vill in the per nomen was not material.

Another Case to the same purpose was urg'd of Gay against Cay, where a Grant in possession was pleaded, and not as in Reversion: And upon view of the Record, the Grantor had granted Tenementa prædicta per nomen, of a Mesuage which A. P. held for life, where the per nomen was adjudg'd not to make good the Grant. 41 Eliz. Cro.  
f. 662. pl. 109.

The Court is of Opinion, notwithstanding these Cases, That in the present Case the per nomen is well enough, because it is alledg'd the Grantor was seisd of Two hundred Acres of Land in Kings Norton, whereof the locus in quo being Twenty Acres, is parcel: By reason whereof, the Rent being granted out of every parcel of the Two hundred Acres, it is well enough to say it was granted out of the Twenty Acres per nomen of all his Lands in Kings Norton; because the Twenty Acres are alledg'd to be parcel of all his Lands there, being Two hundred Acres.

But in Chapman's Case, It is not alledg'd that the Twenty Acres of Land demis'd were parcel of all the Tenements in S. per nomen, of which the Twenty Acres were to pass.

As for the second Case of Gay, it was not possible that Lands granted, as in possession should pass, per nomen, of Land, that was in Reversion.

The second Exception is, Because the Clause of Entry and Distress in the Deed upon Oyer of it, differs from the Clause of Entry and Distress alledg'd in the Conizance. For in the Conizance it is said, It should be lawful to Enter and Distrain if the rent were unpaid and behind after any of the Feasts whereon it was due, that is, at any Feast that should first happen after the death of Anne or Thomas Greaves, for the Rent did not commence before.

But by the Deed, If the Rent were behind at any the Feasts, the Entry and Distress is made to be lawful for it, during the joynt Lives of Anne and Thomas Greaves the Uncle, and during their joynt lives, it could not be behind, for it commenc'd not till one of them were dead.

Scarpus &  
Handkinfon  
37 El. Cro. f.  
420. words  
repugnant  
and senseless  
to be rejected.

So as the sense must run, That if the Rent wert behind, it should be lawful to distrain during the joint Lives of *Anne* and *Thomas Greaves*, which was before it could be behind; for it could not be behind till the death of one of them. Therefore those words, during their joynt natural lives, being insensible, ought to be rejected. For words of known signification, but so placed in the Context of a Deed, that they make it repugnant and senseless, are to be rejected equally with words of no known signification.

Judgment pro Defendent. The Chief Justice delivered the Opinion of the Court.

*Trin.*

*Trin. 16 Car. II. C. B. Rot. 2487. But  
Adjdg'd Mich. 20 Car. II.*

*Bedell versus Constable.*

**B**y the Act of 12 Car. 2. cap. 24. It is among other things Enacted, That where any person hath, or shall have, any Child or Children under the Age of One and twenty years, and not married at the time of his death, It shall and may be lawful to and for the Father of such Child or Children, whether born at the time of the decease of the Father, or at that time *in ventre sa mere*; or whether such Father be within the Age of One and twenty years, or of full Age, by his Deed executed in his life time, or by his last Will and Testament in writing, in the presence of two or more credible Witnesses, to dispose of the custody and tuition of such Child or Children, for, and during such time as he or they shall respectively remain under the Age of One and twenty years, or any lesser time, to any person or persons in possession or remainder, other than Popish Recusants: And such disposition of the Custody of such Child or Children made since the Four and twentieth of February, 1645. or hereafter to be made, shall be good and effectual against all and every person or persons claiming the custody or tuition of such Child or Children as Guardian in Socage or otherwise: And such person or persons to whom the custody of such Child or Children hath been, or shall be so disposed or devised as aforesaid, shall and may maintain an Action of Ravishment of Ward, or Trespasse, against any person or persons which shall wrongfully take away or detain such Child or Children, for the Recovery of such Child or Children, and shall and may recover Damages for the same in the said Action, for the use and benefit of such Child or Children.

And such person or persons to whom the custody of such Child or Children hath been, or shall be, so disposed or devised, shall and may take into his or their custody to the use of such Child or Children, the profits of all Lands, Tenements, and Hereditaments of such Child or Children; and also the custody, tuition, and management



nagement of the Goods, Chattels, and personal Estate of such Child or Children, till their respective Age of One and twenty years, or any lesser time, according to such Disposition aforesaid; and may bring such Action or Actions in relation thereto, as by Law a Guardian in Common Soccage might do.

By the Will is devised in these words,

I do bequeath my son *Thomas* to my Brother *Robert Towray* of *Rickhall*, to be his Tutor during his Minority.

Before this Act, Tenant in Soccage of Age might have dispos'd his Land by Deed, or last Will, in trust for his Heir, but not the Custody and Tuition of his Heir; for the Law gave that to the next of Kin, to whom the Land could not descend.

But Tenant in Soccage under Age, could not dispose the Custody of his Heir, nor devise or demise his Land in trust for him in any manner. Now by this Statute he may grant the Custody of his Heir, but cannot devise or demise his Land in trust for him for any time directly; for if he should, the devise or demise were as before the Statute (as I conceive) which is most observable in this Case.

I say directly he cannot, but by a mean and obliquely he may; for nominating who shall have the Custody, and for what time, by a consequent the Land follows, as an incident given by the Law to attend the custody, not as an Interest devis'd or demis'd by the party.

This difference is very material; for if the Father could devise the Land in trust for him until his Son came to One and twenty, as he can grant the Custody then, as in other Cases of Leases for years, the Land undoubtedly should go to the Executor or Administrator of him whom the Father named, for the tuition, and the trust should follow the Land, as in other Cases, where Lands are convey'd in trust.

But when he cannot, ex directo, devise the Land in trust, then the Land follows the Custody, and not the Custody the Land; and the Land must go as the Custody can go, and not the Custody as the Land can go.

Coke Litt. f.  
49. 2.  
1 H. 7. 28.  
3 H. 7. 4.

As where a House or Land belongs to an Office, or a Chamber to a Corody, the Office or Corody being granted by Deed, the House and Land follows as incident, or belonging without Liberty, because the Office is the principal, and the Land but pertaining to it.

A second Consideration is, That by this Act no new custody is instituted, but the office of Guardian, as to the duty and power of the place, is left the same, as the Law before had prescribed and settled of Guardian in Socage.

But the modus habendi of that office is alter'd by this Act in two Circumstances. The first,

1. It may be held for a longer time, viz. to the Age of the Heir of One and twenty, where before it was but to Fourteen.

2. It may be by other persons held, for before it was the next of Kindred, not inheritable, could have it, now who the Father names shall have it.

So it is, as if an Office grantable for life only before, should be made grantable for years by Parliament, or grantable before to any person, should be made grantable but to some kind of persons only.

The Office, as to the Duty of it, and its essence, is the same it was: But the Modus habendi alter'd.

If therefore this new Guardian is the same in Office and Interest with the former Guardian in Socage, and varies from it only in the Modus habendi, then the Ward hath the same legal Remedy against this Guardian as was against the old. But if this be a new Office of Guardianship, differing in its nature from the other, the Heir hath no remedy against him at all in Law; for though this new Guardian be enabled to have such Actions as the old might have, yet this Act enables not the Heir to have like Actions, or any other against him, as he might against the Guardian in Socage.

The Intent of this Statute is to preserve the Father against common right to appoint the Guardian of his Heir, and the time of his Wardship under One and twenty: But leaves the Heirs of all other Ancestors Wards in Socage, as before: Therefore I hold,

1. That such a Special Guardian cannot transfer the Custody of the Ward by Deed or will to any other.

2. That he hath no different Interest from a Guardian in Socage, but for the time of the Wardship.

1. When an Act of Parliament alters the Common Law, the meaning shall not be strained beyond the words, except in Cases of publick Utility, when the end of the Act appears to be larger than the enacting words. But by the words the Father only can appoint the Guardian, therefore the Guardian so appointed, cannot appoint another Guardian.

2. The

2. The Mother hath the same concern for her Heir, as the Father hath; But she cannot by the Act name a Guardian, therefore much less can the Guardian named by the Father.

3. The Father cannot by the Act give the custody to a Papist, but if it may be transferr'd over by him whom the Father names, or by Act in Law go to his Executor or Administrator, it may come to a Papist, against the meaning of the Act.

4. Offices or Acts of personal Trust cannot be assign'd; for the Trust is not personal which any man may have.

Dyer 2 & 3  
Eliz. f. 189.b.

5. At the Common Law none could have the Custody and Marriage of a mans Son and Heir apparent from the Father, yet the Father could not grant or sell the Custody and Marriage of his Heir apparent, though the marriage was to his own benefit, as was resolved by the greater number of the Judges in the Lord Bray's Case, who by Indenture had sold for Eight hundred pounds the Custody and Marriage of his Son and Heir apparent, in the time of Henry the Eighth, to the

Lord Audley, Chancellor of England.

Lord Cromwell, Lord Privy Seal.

Sir William Paulet, Treasurer of the Household.

The Marquis of Winchester, Lord Treasurer.

Dyer supra  
f. 190.b. pl. 19.

The Reason given is, That the Father hath no Interest to be granted or sold to a Stranger in his eldest Son, but it is inseparably annex'd to the person of the Father.

Two Judges differ'd, because an Action of Trespas would lye for taking away a mans Heir apparent, and marrying him, whence they conclude he might be granted as a Chattel.

11 H. 4. f. 23.a.  
FHz. N. Br.  
Tresp. f. 90.b.  
Lett. G. f. 89.  
Lett. O.

But an Action of Trespas will lye for taking away ones Servant.

For taking away a Monk, where he was cloyster'd in Castigation.

Pro Uxore abducta cum bonis Viri; yet none of these are assignable.

West. 1. c. 48.

By the Statute of Westminster the First, If the Guardian in Chivalry made a Feoffment of the Wards Lands in his Custody during his Minority, the Heir might forthwith have a Writ of Novel Disseisin against the Guardian and Tenant, and the Land recover'd should be deliver'd to the next of kinn to the Heir, to be kept and accompted for to him at his full Age.

This

This was neither Guardian in Soccage nor Chivalry, but a special Guardian appointed by the Statute, and such a Guardian could not assign over, nor should it go to his Executors by the Express Book.

This Case likewise, and common Experience proves, That Guardian in Soccage cannot assign, nor shall the Custody go to his Executors; though some ancient Books make some doubt therein.

For expressly by the Statute of 52 H.3. the next of kin is to answer and be accountable to the Heir in Soccage, as this special Guardian is here by Westminster the First.

These several sorts of Guardians trusted for the Heir, could neither assign their Custody, nor did it go to their Executors, because the Trust was personal, and they had no Interest for themselves.

The Trust is as personal in this new Guardian, nor hath he any Interest in it for himself; and therefore he shall not assign it.

A Guardian in Soccage cannot transfere his Custody, because it is a personal Trust, but the Trust of this special Guardian is more personal; therefore that he shall transfere it, concludes strangely.

The Office of a Phylizer is an Office of personal Trust to do the business of the Court, and not assignable, no Execution can be upon it.

Sir George Reynels Case, an Office of Trust and Confidence cannot be granted for years, because then it might go to persons (that is, to Executors or Administrators) never trusted or confided in.

So is Littleton expressly, That all Offices of Trust, as Steward, Constable, Bedlary, Bailiffwick, must be personally occupied, unless they be granted to be occupied by a Deputy, and are not assignable.

And a more near or tenderer Trust cannot be, than the Custody and Education of a mans Child and Heir, and preservation of his Estate.

It may be said, That in these Cases the Law doth particularly appoint the Guardians, and therefore no others can be. But in the Case at Barr the Father appoints the person, not the Law.

It is true, there is a difference in the Cases, but not to make the Trust more assignable in the one Case, than the other.

Coke 2. Inst. f. 260. b.  
By 4.5 P.M.e.  
8. No woman child under 16. can be taken against his will whom the Father hath made Guardian by Deed or Will. yet this is no lease of the Custody till 16. nor is it assignable.  
Ratcliffs C. 2. Rep.  
Shoeplands C. 3 Jac. Cr. 199.

28 H.3. f. 7.  
Dyer.

Sect. 379.



Where the Law appoints who ſhall be truſted, the Truſt cannot be reſused, as in the ſeveral Guardians beſore mentioned.

But where the Perſon names the Truſtee, the Truſt may be reſused; but once accepted, it cannot be transfer'd to others, more than where the Law names the Truſtee.

An Executor hath a private office of Truſt (ſor we ſpeak not of publique) and is named by the Teſtator, not by the Law; therefore he may reſuse, but cannot assign his Executorſhip.

But it is true, an Executor may make an Executor (due Circumſtances obſerved) who ſhall diſcharge the ſirſt Teſtators Truſt, but the reaſon is, that after Debts paid, and Legacies, the Surplus of the Goods belongs to the Executor, *proprio jure*.

An Adminiſtrator hath a private Office of Truſt, he cannot assign nor leave it to his Executor, he is not named by the Teſtate, but by the Law in part ſor him, but not peremptorily, he may not claim it if he will, becauſe it muſt paſs through the Ordinary.

A mans Bailiff or Receiver are Offices of perſonal Truſt, and not assignable; ſo is the Office of every Servant.

An Arbitrator, or one authorized to ſell a mans Land, to giſve Livery, or receive it, cannot assign; it is a perſonal Confidence,

1. A Cuſtody is not in its nature Teſtamentary, it cannot pay Debts nor Legacies, nor be diſtributed as Alms.

2. It is not accomptable ſor to the Ordinary, as Teſtates Goods are.

3. The Heir ought to have a Guardian without Interruption but an Executor may be long beſore he proves the Will, and may at length reſuse. An Adminiſtration, long beſore it be granted, and after, may be ſuſpended by Appeal; and in theſe times the Ward hath no certain Guardian reſponſal ſor his Eſtate or Perſon.

Shopland's C.  
3 Jac. Cr. 99.

And where it may be ſaid, That theſe are naked Authorities, and the perſons have no Inter-eſt, but a Guardian hath Inter-eſt, he may lett and ſett the Wards Land during minority, Avow in his own name, Grant Copy-hold Eſtates, and the like.

It is an Interest conjoynd with his trust for the Ward, ( I speak not here of equitable trusts, without which Interest he could not discharge the trust ) but it must be an Interest for himself, which is transferrable, or shall go to his Executor.

All Executors and Administrators have Interest and Property necessary to their Trusts ; for they may sell the Goods or Leases of the Testator or Intestate, without which they could not execute the Trust.

A Monk made an Executor might do the like, who in his own right could have no Interest or Property.

But such Interest proves not that the Executors or Administrators may assign their Trust, or that it shall go to their Executors ; for it is agreed in that Case of Shopland, That such Interest as a Guardian in Socage hath, shall not go to his Executor, but is annexed to his Person, and therefore not transferrable.

Guardian in Socage may demise his Guardianship and grant over his Estate. N.Br. f.145-b. Letter H. quod nota;

So as I take the sense of the Act, collected in short, to be,

Whereas all Tenures are now Socage, and the next of kinn, to whom the Land cannot descend, is Guardian until the Heirs Age of Fourteen ; yet the Father, if he will, may henceforth nominate the Guardian to his Heir, and for any time, until the Heirs Age of One and twenty, and such Guardian shall have like remedy for the Ward, as the Guardian in Socage by the Common Law hath.

Another Exposition of this Act hath been offer'd, as if the Father did devise his Land by way of Lease, during the minority of the Heir, to him to whom he gave the Custody in Trust for the Heir, and so the Land was assignable over, and went to the Executors, but follow'd with the Trust.

1. This is a forc'd Exposition to carry the Custody to any Stranger, to the Father, or to the Child, or to any that may inherit the Land contrary to the ancient and excellent policy of the Law.

2. By such an Exposition the Heir should have no Account of such a Lessee, as he may against a Guardian, but must sue in equity, for this Statute gives Actions, such as Guardians might have to him, who hath the Custody, but gives none against him.

3. If such Lessee should give the Heirs marriage, the Heir hath no Remedy, but the Guardian in Socage shall account for what the marriage was worth.

Coke Litt. f. 896.

Stat. Mal-  
bridge c. 17.

The Statute only ſaith, That ſuch perſon nominated by the Father may take to his Cuſtody the Profits of all Lands, Tenements, and Hereditaments of ſuch Child and Children, and alſo the Cuſtody, Tuition, and Management of the Goods, Chattels, and perſonal Eſtate of ſuch Child or Children; And may bring ſuch Action in relation thereto, as a Guardian in Soccage might do.

None of which words will charge him with the value of the Marriage, if he had nothing for it.

Na.Br.f. 139.b  
Lett. H.

4. If the Heir be in cuſtody of ſuch a Leſſee, and be Guardian by nearneſs of kin to another Infant. The Guardian of the Heir by Law is Guardian to both; but ſuch a Leſſee hath no pretence to be Guardian of the ſecond Infant by any word of the Act; For he is neither an Hereditament, or Goods, or Chattels of the firſt Infant.

As to the ſecond part;

If the Father, being of Age, ſhould deviſe his Land to J. S. during the Minority of his Son and Heir, in truſt for his Heir, and for his Maintenance and Education, until he be of Age.

This is no deviſing of the Cuſtody within this Statute, for he might have done this before the Statute.

If the Father, under Age, ſhould make ſuch a Deviſe, it were abſolutely void; for the ſame ſyllables ſhall never give the Cuſtody of the Heir by the Father under Age, which do not give it by the Father which is of Age.

But in both Caſes a Deviſe of the Cuſtody is effectual, and there is no reaſon that the Cuſtody deviſ'd ſhall operate into a Leaſe, when a Leaſe deviſ'd ſhall not operate into a Cuſtody, which it cannot do.

If a man deviſe the Cuſtody of his Heir apparent to J. S. and mentions no time, either during his Minority, or for any other time, this is a good deviſe of the Cuſtody within the Act, if the Heir be under Fourteen at the death of the Father, becauſe by the Deviſe the *Modus habendi Cuſtodiam* is chang'd only as to the perſon, and left the ſame it was as to the time.

But if above Fourteen at the Father's death, then the Deviſe of the Cuſtody is meerly void for the uncertainty.

For

For the Act did not intend every Heir should be in Custody until One and twenty, Non ut tamdiu sed ne diutius, therefore he shall be in this Custody but so long as the Father appoints; and if he appoint no time, there is no Custody.

If a man have power to make Leases for any term of years, not exceeding One hundred, and he demises Land, but expresseth no time, shall this therefore be a Lease for One hundred years? There is no Reason it should be a Lease; for the greatest term he could grant, more than for the least term he could grant, or indeed for any other term under One hundred: Therefore it is void for uncertainty; and the Case is the same for the Custody.

For if the Father might intend as well any time under that, no Reason will enforce that he only intended that.

And to say he intended the Custody for some time, therefore since no other can be, it must be for that, will hold as well in the Lease, and in all other Cases of uncertainty. If a man devises Ten pounds to his Servant, but having many, none shall have it for the uncertainty.

It may be demanded, If the Father appoint the Custody until the Age of One and twenty, and the Guardian dye, what shall become of this Custody?

It determines with the death of the Guardian, and is a Condition in Law; and the same as if a man grant to a man the Stewardship of his Manor for Ten years, or to be his Bailiff: It is implied by way of Condition, if he live so long.

A Coppholder in Fee surrenders to the Lord, ad intentionem, that the Lord should grant it back to him for term of life, the Remainder to his Wife, till his Son came to One and twenty, Remainder to the Son in tail, Remainder to the Wife for life. The Husband died: The Lord at his Court granted the Land to the Wife till the Sons full age. The Remainders, ut supra; The Wife marries and dies Intestate; The Husband held in the Land; The Wives Administrator, and to whom the Lord had granted the Land, during the Minority of the Son, enters upon the Husband.

This Entry was adjudged unlawful, because it was the Wives term; but otherwise it had been, if the Wife had been but a Guardian, or next Friend of this Land.

The like Case is in Hobart.

If it be insisted, That this new Guardian hath the Custody, not only of the Lands descended or left by the Father, but of all

Dyer 8 Eliz.  
f. 251. pl. 90.

Balder and  
Blackburn  
f. 285. 17 Jani



all Lands and Goods any way acquir'd or purchas'd by the Infant, which the Guardian in Soccage had not.

That alters not the Case; for if he were Guardian in Soccage without that particular power given by the Statute, he is equally Guardian in Soccage with it, and is no more than if the Statute had appointed Guardian in Soccage to have care of all the Estate of the Infant, however he came by it.

Besides that proves directly that this new Guardian doth not derive his interest from the Father, but from the Law; for the Father could never give him power or interest of or in that which was never his.

The Court was divided, viz. The Chief Justice, and Justice *Wylde* for the Plaintiff; Justice *Tyrrell* and Justice *Archer* for the Defendant.

*End.*

Hill. 19 & 20 Car. II. C. B. Rot. 506.

*Holden versus Smallbrooke.*

**I**N Tröver and Conversion, and not Guilty pleaded, the Jury *Robinson* gave a Special Verdict to this Effect, That Doctor Malory Prebendary of the Prebend of *Wolvery*, founded in the Cathedral of *Litchfield*, seis'd of the said Prebend and one Messuage, one Barn, and the Glebe appertaining thereto, and of the Tithes of *Wolvery* in right of his Prebend, 22 April. 13 Car. 2. by Indenture demised to *Giles Astly*, and his Assigns, the said Prebend, together with all Houses, Barns, Tenements, Glebe Lands and Tithes thereto belonging for three Lives, under the ancient Rent of Five pounds ten shillings, *Astly* (being one of the Lives) died seis'd of the Premises; at whose death one *Taverner* was Tenant for one year (not ended) of the Demise of *Astly*, of the Messuage, Barn, and Glebe Lands, and in possession of them, whereupon the Plaintiff entred into the Messuage and Glebe, and was in the possession of the same and of the Tithes as Occupant. And afterwards *Frances Astly*, the Relict of the said *Giles Astly* enters upon the Messuage, and claims the same as Occupant, *in hac verba*, *Frances Astly*, Widow of *Giles Astly*, enters upon the House, and claims the same, with the Glebe and Tithe, as Occupant; *Taverner* attorns to *Frances Astly*, and afterwards grants and assigns all his Estate in the Premises to the Plaintiff; afterwards *Conquest*, the Husband of *Frances Astly*, took one Sheaf of Corn in the name of all the Tithes, and afterwards demised the Tithes to the Defendant: The Tithes are set forth, and the Defendant took them, whereupon the Plaintiff brought this Action.

Before I deliver my Opinion concerning the particular Questions before open'd, arising upon this Record, I shall say somewhat shortly of Natural Occupancy and Civil Occupancy.

First opening what I mean by those terms, then briefly shewing their difference, as far only as is material to the Questions now before me,

I call Natural Occupancy the possession either of such natural things as are immoveable, fixt, and permanent, as Land, a Pool, River, Sea (for a Sea is capable of Occupancy and Dominion naturally, as well as Land, and hath naturally been in Occupancy, as is demonstrated in *Dr. Selden's Mare Clausum* at large; which I ye unpossess'd, and in which no other hath prior right.

Of things natural and moveable, either animate as a Horse, a Cow, a Sheep, and the like, without number, or Inanimate, as Gold, precious Stones, Grain, Honey, Fruit, Flesh, and the like, numberless also, wherein no man, until the possession thereof by Occupancy, had any other right than every man had (which is as much as to say) wherein no man had right, for that which is equally every mans right, is no mans right.

Whence it follows (for I shall not speak of the usage or extent of such a possession by natural Occupancy, it being a subject too large, and not necessary for my present purpose)

1. That there can be no Occupancy natural of any thing wherein another than the Occupant hath right: For by the definition made, natural Occupancy is the first right.

2. A Claim, without actual possession, cannot make a man a natural Occupant: For,

1. When a Claim is, cannot be possibly known to all concern'd in the Occupancy of a natural thing, and what cannot be known, is (as to all effect of right) as if it had not been; nor is there any Character of a natural Claim, but the possession and use of the thing, but civilly there may, either by word or other sign, agreed on.

2. The end of a natural Right, to any natural thing, is the separate use of the thing to a part of Mankind, which cannot be used by all Mankind; but if Claim only would give a Right to the things of nature, they might still remain, as much without use after the Claim as before, which agrees not with the end of Nature in giving a Right to natural things.

3. If Claim could give a Natural Right, one might claim all things in the Universe, not already appropriated, and might have done so in the beginning of time, when nothing almost was appropriated.

4. A natural Occupant hath no Estate of Fee, Freehold, or the like, which are Estates formed and raised by municipal Laws, but hath only a bare possession to keep or forlake.

5. That Land possessed by a natural Occupant must be without any sort of Vassallage of Service, Rent, Condition, or other Charge whatsoever, for those servitudes upon the Land cannot be conceiv'd without a former right in him that laid them, but natural Occupancy of things wherein none had any former right, or having any, have deserted it; for naturally a man can have nothing against his own will.

6. Two or more cannot, at the same time, have severally plenary possession, that is, Occupancy, of the same thing; therefore none can have right to that by reason of possession, whereof another is already possess'd, for then there would be two plenary Possessors severally of the same thing at the same time, which is impossible.

And although every Nation hath, by Consent and Agreement among the people of it, its proper Laws to guide and determine mens Properties to all things capable of property and ownership, yet the ancientest Nations of the World have no other right against each other to their own Countries and Territories, than this original and natural occupancy, and that Nation that will not admit a right by occupancy to another Nation in the Land so possess'd by it, must at the same time confess they have no right to their own, which they hold but in like manner.

They who would be further satisfied concerning this kind of occupancy, may resort, for exactness above other Books upon this Subject, to Mr. Selden's *Mare Clausum*, lib. 1. and to Hugo Grotius his first Book, de *Jure Belli & Pacis*, c. 3. de acquisitione originaria rerum; & c. 4. de derelictione præsumpta, & eam secuta occupatione, &c.

Selden's *Mare Clausum*, l. 1.  
Grotius de *Jure Belli*, l. 1. c. 3. 4.

1. By Civil Occupancy I mean such an occupancy, either of things immoveable, as Lands; or of things moveable, as is according to institution and the law of the place, and particularly according to the Law of England, as to the decision of the Question before us.

2. By the Law of England, there is no occupancy by any person, of any thing which another hath a present right to possess, wherein the Law of the Land agrees with that of natural occupancy.



Occupancy by the Law must be of things which have natural existence, as of Land, or of other natural things, not of things which have their being and creation from Laws and Agreements of men; for there is no direct and immediate occupancy of a Rent, a Common, an Advowson, a Fair, a Market, a Remainder, a Dignity, and the like.

Cok. Litt. f. 41.  
b. Cr. 41 El. f.  
721. Crauley  
C. p. 30. no  
Occupancy  
of a Rent.

There can be no Occupant of any thing that lieth in grant, and cannot pass without Deed, because every Occupant must claim by a que estare, and averr the life of Cestuy que vie.

And in this the Civil Occupancy with us of Land agrees with Natural Occupancy, which must be of a thing that hath natural existence, and not only legal.

But although the Occupancy be always of a natural thing, yet the Occupant doth thereby by the Law enjoy several things, many times, that have their being by Law only, as an Occupant of Land may thereby enjoy a Common Occupant of a House Estovers, of the demesne Lands of a Mannor, the Services and Advowsons appendant, which are not themselves natural things, but things created by Law, nor are they immediately and by themselves capable of Occupancy, but with reference to, and as adjuncts of the Land; and herein the civil Occupancy differs from the natural.

And the reason is clear, because the occupancy of the Land, which ought not to lye bold, doth not sever or separate any thing from the Land which the Law hath joyned with it; and if it doth not separate from it that which is joyn'd with it by Law, though that be not capable of Occupancy in it self, as an Advowson or Common, it must follow that such things continue joyn'd or belonging to the Land as before, notwithstanding the occupancy of the Land.

Cok. Litt.  
f. 41. b.

In civil occupancy the Land in occupancy is charg'd with all the servitude impos'd by the first Lessor or by the Law. As 1. to the payment of Rent, 2. to be subject to waste, 3. to forfeiture, 4. to other Conditions, wherein it differs from Land whereof a man is a natural occupant:

Brañ. l. 2. c. 1.

As to the civil occupancy of moveable things, which are commonly termed personal things or goods, there are few of those in our Law that have not a Proprietor (and consequently no Occupant can be of them) those which fall under occupancy of that kind, are for the most part found in things, *feræ naturæ*, whose acquisition is either *per piscationem*, as in Fish, or *per aucupium*, as in Fowl, or *per venationem*, by hunting: These do *cedere occupanti communi Jure*.

1. Hence

1. Hence it follows by way of Inference and Corollary, That there can be no primary and immediate Occupancy of a Tithe, ſoꝛ it is not in its own nature capable of Occupancy moꝛe than a Rent oꝛ Common is, and is in truth in its nature but a Rent, it cannot paſs by it ſelf, but by Deed, and as other things which lye in grant.

A ſecond thing that follows out of the ſoꝛmer Premises, is, That the Freehold, qua Freehold, is not the thing whereof there is an Occupancy; ſoꝛ the Freehold is not a natural thing, but hath its eſſence by the poſitive Municipal Law of the Kingdom, it cannot abſtract from the Land in this matter of Occupancy, be either entered into, oꝛ poſſeſſed. The Freehold is an immediate conſequent of the poſſeſſion; ſoꝛ when a man hath gotten the poſſeſſion of Land that was void of a Proprietor, oꝛ other thing capable of Occupancy, the Law ſoꝛthwith doth caſt the Freehold upon the Poſſeſſoꝛ, to make a ſufficient Tenant to the Precipe. Therefore

As to the firſt Queſtion, Whether Holden the Plaintiffs Entry upon the Leſſee Taverner's poſſeſſion, into the Houſe, Glebe, and Barn the Firſt of March, 1666. and openly ſaying, I enter and take poſſeſſion of this Houſe, Glebe, and Barn, and the Ground thereto belonging, and the Tithes of Woolney, in my own Name and Right, as Occupant upon a Leaſe made to Giles Aſtly and his Aſſigns for three Lives, by Dr. Mallory, Prebend of Woolney, did make him Occupant of the Houſe, Land, and Tithe, oꝛ either of them, the Leſſee Taverner not having made any Claim as Occupant to any of them? Queſt. 1.

I hold clearly, this Entry and Claim did not make Holden Occupant of the Houſe, Land, oꝛ Tithe, oꝛ of any of them.

To every Occupant of Land, oꝛ other thing capable of Occupancy, two things are requiſite. 1. Poſſeſſion of the Land which was void and without Owner. 2. The having of the Freehold to avoid an obedience, which is had as well where the poſſeſſion is not void, as where it is.

The firſt, that is the poſſeſſion, is acquired by the party, and his Act, but the Freehold is acquit'd by the Act of Law, which caſts it upon the poſſeſſion aſſoon as there is a Poſſeſſor, oꝛ where it finds a Poſſeſſor when the Freehold is in none.

1. This Claim and Entry was in Order to gain the firſt poſſeſſion of the Land which was void; but that was impoſſible to be had, ſoꝛ the Leſſee Taverner had the poſſeſſion befoꝛe he held it then; therefore the Claim was to no end.

2. Secondly, A man cannot be an Occupant but of a void Poſſeſſion, or of a Poſſeſſion which himſelf hath; but here was no void Poſſeſſion when Holden enter'd and claimed as Occupant, for the Leſſee was in lawful poſſeſſion of the Houſe and Barn and Land at the time of the entry and claim.

3. Thirdly, If this Entry and Claim ſhould make Holden a legal Occupant, which cannot be without gaining the poſſeſſion, then there would be two plenary legal poſſeſſors of the ſame thing at the ſame time, Holden by his Entry and Claim, and Taverner the Leſſee by virtue of his leaſe; but that is impoſſible there ſhould be two plenary poſſeſſors of the ſame thing at the ſame time: Therefore Holden can be no Occupant by ſuch Entry and Claim.

Skelton &  
Hay, 17 Jac.  
Cr. 554.b.

4. This very Caſe in every point hath been reſolv'd in the Caſe of Skelton and Hay, 17 Jac. where upon an Ejectment brought, a Special Verdict found, That the Biſhop of Worceſter made a leaſe to Sir William Whorehood of certain land for his own, and the lives of two of his Sons. Sir William did let the land to John Mallett at will, rendring Rent, and dyed; Mallett continued the poſſeſſion, not claiming as Occupant; one of Sir William's Sons entered as Occupant, and made a leaſe to the Plaintiff in the Action: It was adjudg'd that Mallett the Defendant, being in poſſeſſion, the Law caſt the Freehold upon him without Claim; and had he diſclaim'd to hold as Occupant, keeping the poſſeſſion, he muſt have been the Occupant, for where one entered to the uſe of another, he that entered was adjudg'd the Occupant.

Chamberlayn  
& Ewes C.  
Rolls 2. part.  
f. 151. Lett. E.

Which Caſe proves one may be an Occupant againſt and beſides his own intention, and therefore a Claim to denote his intention.

5. To be an Occupant is not neceſſary; and Tenant for years, as well as at will, is Occupant by that Caſe.

Beſides claiming to be Occupant, is to claim to be in poſſeſſion, or to claim the Freehold, or both; but the Law binds not a man to claim that which he hath already; and therefore he that hath poſſeſſion, and doth occupy the land, is not to claim poſſeſſion, or to be Occupant of it; no more is he to claim a Freehold which he already hath, for the Law hath caſt it where it finds the poſſeſſion; ſo having both poſſeſſion and Freehold, the Law binds him not to claim what he hath.

6. Claim is never to make a Right which a man hath not, but to preserve that which he hath from being lost: As Claim to avoid a Descent, whereby a man had lost his right to enter, so a man makes no Claim to be remitted, when by act of law he is in his Remitter.

As to the second Question, Whether Frances Astly, the Re. Quest. 2.  
lisa of Giles, entering the Five and twentieth of March, 1667.  
upon the Lessee Taverner's possession, and claiming the House,  
Glebe and Tithes, as Occupant, and the Lessee Taverner attorn-  
ing to her, makes her an Occupant of the House, Land, or Tithes?  
The Question hath nothing in it differing from the former,  
but only the Attornment; and it is clear, the Attornment of Ta-  
verner the Lessee doth not disclaim his possession, but affirms it;  
for Attornment is the Act of a Tenant, by reason of his being  
in possession. Besides, admitting the Tenant a perfect Occu-  
pant, he might, continuing so, attorn to whom he pleased, as  
well as Astly might have done in his life time, yet still continue  
the Estate that was in him.

It follows then that Taverner was the undoubted Occupant,  
after Astly's death, of the House, Land, and Barn; but whether  
he had the Tithes of Woolney by such his Occupancy, whereof Ast-  
ly died seised, is the difficult Question?

Another Question will arise, when Taverner the Lessee, who  
had by lease the House, Barn, and Land, and so found, and was  
Occupant certainly of those, when afterwards Taverner the  
Lessee, concessit & assignavit totum statum suum de & in premissis  
to Holden the Plaintiff, and gave him Livery and Seisin there.  
upon, what shall be understood to pass by the word premissis?  
if only what was leas'd, and his Estate therein as Occupant,  
and likewise the Tithes, if the Tithes accrued to him by reason of  
being Occupant of the land? 12 June 1667

For if he were Occupant of the Tithes by Act in Law, by be-  
ing Occupant of the land, it follows not that if he pass all his  
Estate to Holden in the House and Land, and gave him Livery,  
that therefore he pass his Estate in the Tithes, nor is such passing  
found to be by Deed.



To clear the way then towards resolving the principal Question.

1. At the time of Giles Astly's death, the Tithes and the House and Lands were sever'd in Interest; for the Lessee Taverner had a Lease of the House, Glebe, and Barn, and the Tithe continued in Astly.

2. This severance was equally the same, as if the Tithe had been demis'd to Taverner, and the House and Land had remained still in Astly's possession.

3. Though the Freehold of both remained still in Astly at his death, notwithstanding the divided Interest in the Land and Tithe; yet the Freehold being a thing, quatenus Freehold, not capable in it self of Occupancy, nor no natural, but a legal thing, which the Law casts upon him that is Occupant, that will not concern the Questions, either who was Occupant, or of what he was Occupant?

Cok. Litt. f.  
411b.

4. I take it for clear, That a naked Tithe, granted by it self *pur auter vie*, and the Grantee dying without assignment, living *Cestuy que vie*, is not capable of Occupancy, more than a Rent, a Common in gross, and Advowson in gross, a Fair, or the like are, it being a thing lying in Grant equally as those others do. Coke's Littleton; There can be no Occupant of any thing which lyeth in Grant, and cannot pass without Deed. I cited the place at full before with other Authorities against Occupancy of a Rent.

5. If a man dye seis'd of Land which he holds *pur auter vie*, and also dies seis'd of Rent held *pur auter vie*, or of an Advowson or Common in gross, held by distinct Grants, *pur auter vie*, and the same *Cestuy que vie*, or the several *Cestuy vies* (for that will not differ the Case) living: Though the Grantee died seis'd of a Freehold in these several things, I conceive that he which enters into the Land first, after his death, will be Occupant of the Land which was capable of Occupancy; but neither of the Tithe, Advowson, nor Common, which are not capable of Occupancy, and have no more coherence with, dependence upon, nor relation to, the Land, than if they had been granted *pur auter vie*, to another, who had happen'd to dye in like manner as the Grantee of the Land did.

And

And that which hath intricated men in this matter, hath been a Conception taken up, as if the Occupant had for his object in being Occupant, the Freehold which the Tenant died seisd of, which is a mistake; for the subject and object of the Occupant are only such things which are capable of Occupancy, not things which are not, and not the Freehold at all, into which he neither both, nor can enter; but the Law casts it immediately upon him that hath made himself Occupant of the Land or other real thing whereof he is Occupant, that there may be a Tenant to the Precipe. But, as was well observed by my Brother Wilmott, No Precipe lies for setting out Tithes at Common Law; and I doubt not, by the Statute of 32 H. 8. c. 7. though Sir Edward Coke in his Litt. f. 159. a. seems to be of opinion, Coke Litt. 159. a. that a man may at his Election have remedy for withholding Tithes, after that Statute, by Action or in the Ecclesiastical Court, by that Statute doubtless he hath for the title of Tithes as for title of Land, or for the taking of them away, but not perhaps for not setting them out.

6. When a Severance therefore is once made of the Land and Tithes, it is as much severance of them, though the Tithes remain in A's possession, as if he had leas'd the Land to Taverner, and the Tithes to another, if then Taverner becoming Occupant of the Land, should have had nothing in the Tithes leas'd to another, as the Land was to him, no more shall he have the Tithes remaining in A's himself at his death.

Still we must remember the ground insisted on, That no Occupancy begins with the Freehold, but begins by possessing the Land, or other real thing, which was void and ownerless, and that by Act of Law the Freehold is cast upon the Possessor, either entering where the possession was void, or being in possession when Tenant pur autre vie died, either as Lessee for years, or at will to Tenant pur autre vie, for the Law equally casts the Freehold upon him, as was resolved in Chamberleyne and Eures Case, reported by Serjeant Rolls and others, Second Part. f. 151. Letter E. and in Castle and Dods Case, 5 Jac. Cr. f. 200.

Therefore after such Severance made by the Tenant pur autre vie, the Land and Tithes are as distinct and sunder'd from each other, as if Tenant pur autre vie had held them by distinct Grants, or leas'd them to distinct persons.

In the next place I shall agree,

That the Occupant of a House shall have the Estovers, or way pertaining to such House, the Occupant of the Demesne of a Mannor, or of other Land, shall have the Advowson appendant, or Villain regardant to the Mannor or Common belonging to the Land, and the Services of the Mannor not sever'd from the Demesne before the occupancy.

For a Possessor of a House, Land, Demesne of a Mannor, as Occupant, doth not by such his possession sever any thing belonging to the Land, House, or Demesne, more than the Possessor by any other title than occupancy doth; and if they be not sever'd, it follows they must remain as before to the Possessor of that to which they pertain.

So if a Mannor, being an intire thing, consisting of Demesnes and Services, which are parts constituent of the Mannor; the possessing and occupancy of the Demesne, which is one part, can make no severance of the Services from the intire, and therefore the Occupant hath all. And these things, though primarily there can be no occupancy of them, being things that lye in Grant, and pass not without Deed; yet when they are adjuncts, or pertaining to Land, they do pass by Livery only, without Deed.

Coke Litt. f.  
121.8. Sec. 183.

Whatsoever passeth by Livery of Seisin, either in Deed or in Law, may pass without Deed, and not only the Rent and Services, parcel of the Mannor, shall, with the Demesne, as the more principal and worthy, pass by Livery without Deed; but all things regardant, appendant, or appurtenant to the Mannor, as Incidents or Adjuncts to the same, shall, together with the Mannor, pass without Deed, without saying cum pertinentiis. And if they pass by Livery, which must be of the Land, they must likewise pass by any lawful Entry made into the Land, and such the Entry of the Occupant is.

But as by occupancy of the demesne Lands of a Mannor, the Services are not sever'd; so if they be sever'd at the time when the occupancy happens, that shall never of it self unite them again.

Now in the Case before us, The Tithe is neither appendant or appurtenant, or any sort of Adjunct to the Glebe or House, nor are they to the Tithe, nor will a lease and livery of the Glebe simply, with the appurtenances, pass the Tithe at all, nor a Grant of the Tithe pass the Glebe; nor are either  
of

of them constituent parts of the Prebendary or Rectory, as the Services are of a Mannor; for a total severance of the Services and Demesne destroy the Mannor, but a severance of the Tithes or Glebe will not destroy the Rectory, more than the severance of a Mannor, parcel of the possessions of a Bishoprick, will destroy the Bishoprick; for the Glebe and the Tithes are but several possessions belonging to the Rectory.

But it is true, that in the Case before us, and like Cases, a Grant of the Prebendary, or of the Rectory, una cum terra Glebali, & decimis de Woolney, The Tithes, which alone cannot pass without Deed, doth pass by Livery of the Rectory, and so pass, that though the Deed mentions the Tithes to be pass'd, yet if Livery be not given, which must be to pass the Land, the Tithes will not pass by the Deed, because the Intention of the parties is not to pass them severally, but una cum, and together. Browlow; part. 2. f. 201. Rowles and Masons Case.

Therefore the Tithes in such Case must pass in time by the Livery, which did not pass without it, though granted by the Deed.

Yet it is a Question, Whether in such Case the Tithes passeth by the Livery or by the Deed? For though the passing it by Deed is suspended by reason of the intention to pass the Land and Tithes together, and not severally, it follows not, but that the Tithes passeth by the Deed where Livery is given, though not until Livery given.

If a man be seign'd of a Tenement of Land, and likewise of a Tithes, and agrees to sell them both, and without Deed gives Livery in the Tenement to the Bargainee in name of it, and of the Tithes, I conceive the Tithes doth not pass by that Livery.

But a Prebend or Church man cannot now by the Statute of 13 Eliz. c. 10. make a Lease of the possessions of his Prebendary without Deed.

A Prebendary or Rectory is in truth neither the Glebe nor Tithes, nor both, for the one or the other may be recover'd, and might at Common Law have been aliened; the Rectory remaining. But the Rectory is the Church Parochial, whereof the Incumbent taketh the Cure and Seign by his Induction after his Institution, which is his Charge, and

D d

without



without other Seisin then of the Ring or Key of the Church-door, by Induction into the Rectory the Parson is seisd of all the possessions belonging to his Rectory, of what kind soever.

But though by the name of the Rectory the possessions belonging to it, of what nature soever, actually vest in the Incumbent upon Induction, and may pass from the Prebendary by Livery of the Prebend or Rectory to his Lessee, according to the parties intention.

Yet it follows not, That therefore an Occupant, who can be Occupant but of some natural and permanent thing as Land is, should, by being Occupant of that whereof occupancy may be, have thereby some other thing heterogeneous to the nature of Land, and not capable of occupancy, as a Tithe is, being neither appendant or appurtenant, or necessary part of that whereof he is Occupant; nor will it follow, that because by giving Seisin of the Rectory, the Tithe and Glebe belonging to it will pass, that therefore giving Livery of the Glebe will pass the Tithe. For it is observable, That if a man be Tenant in tail of a Mannor to which an Advowson is appendant, or of a Tenement to which a Common is belonging, and discontinue the Issue in tail, shall never have the Advowson or Common, until he hath recontinued the Mannor or Tenement.

But if a man be seisd in tail of a Rectory, consisting of Glebe and Tithe, and discontinue it; after the death of Tenant in tail, the Heir in tail shall have the Tithe which lay in grant, but must recover by Formedon the Rectory and Glebe. This was agreed in this Court in a Case between Christopher Baker and Searl in Ejectment, upon a Demise by the Earl of Bedford of the Rectory of D. & de decimis inde provenientibus for Lives of three other persons, and that Case seems to admit an occupancy of the Tithe, the Question being concerning the Tithe only.

Cr. 37 E.L.  
407. p. 19.  
Baker and  
Searls Case.

Quest. 3.

The next Question will be, That if Taverner, being Occupant of the House and Land, shall not have the Tithe whereof Astly was in possession at the time of his death, what shall become of this Tithe, during the lives of the Cestuy que vies? which is the hard question.

And

And as to this Question ;

If a Rent be granted to A. for the life of B. and A. dies, living B I conceive this Rent to be determined upon the death of A. equally, as if granted to him for his own life. I say determined, because it is not properly extinguish'd, nor is it suspended.

For Extinguishment of a Rent is properly when the Rent is absolutely conveyed to him, who hath the Land out of which the Rent issues; or the Land is convey'd to him to whom the Rent is granted.

And Suspension of a Rent is when either the Rent or Land are so convey'd, not absolutely and finally, but for a certain time after which the Rent will be again reviv'd.

The Reasons why it is determined are, because a thing so granted, as none can take by the Grant, is a void Grant, that is, as if no such Grant had been. Therefore a Grant to the Bishop of L. and his Successors, when there is no Bishop living at the time, or to the Dean and Chapter of Pauls, or to the Mayor and Commonalty of such a place, when there is no Dean or Mayor living at the time of the Grant, is a void Grant, that is, as if it had not been, though such a Grant by way of Remainder may be good. By the same Reason it follows, That when any thing is so granted, that upon some contingent hapning, none can take by the Grant, nor possibly have the thing granted, both the Grant, and thing granted, must necessarily determine; for what difference is there between saying that Rent can no longer be had, when it is determined by his death for whose life it was granted, and saying none can longer have this Rent when it determines by the death of the Grantee *pur auter vie*? For there is no Assignee, Occupant, or any other, can possibly have it; and it is therefore determined.

In an Action of Trover and Conversion brought by Salter against Boteler, the Defendant justifies for that one Robert Bash was seisd in Fee of Twenty Acres in Stansted, and granted a Rent-charge to another Robert Bash, his Executors and Assigns, during the life of Frances the Grantors Wife, of Sixteen pounds per Annum. The Grantor dies, and Frances his wife takes Letters of Administration; and the Defendant, as her Servant, and by her command took a Distress in the said Twenty Acres for Rent arrear, and impounded them;

*Salter. versus  
Boteler.  
44 El. C. 901.*

And Traverseth the Conversion and taking in other manner.

Upon Demurrer to this Plea, all the Court held the Plea to be bad, and gave Judgment for the Plaintiff.

1. Because the Rent was determined by the death of the Grantee, because no Occupant could be of it.

2. Because the Feme was no Assignee by her taking of Administration.

3. None can make title to a Rent to have it against the terr Tenant, unless he be party to the Deed, or make sufficient title under it.

Moore 664.p.  
907. Salter  
vers. Boteler.

The same Case is in Moore, reported to be so adjudg'd; because the Rent was determined by the death of the Grantee; and Popham said, That if a Rent be granted pur auter vie, the Remainder over to another, and the Grantee dies, living Cestuy que vie, the Remainder shall commence forthwith, because the Rent for life determined by the death of the Grantee; which last Case is good Law: For the particular Estate in the Rent must determine when none could have it; and when the particular Estate was determined the Remainder took place.

And as the Law is of a Rent, so must it be of any thing which lies in Grant, as a several Tithe doth; whereof there can be no Occupant, when it is granted pur auter vie, and the Grantee dies in the life of Cestuy que vie.

20 H. 6. f. 7, 8.

This is further cleared by a Case in 20 H. 6. A man purchas'd of an Abbot certain Land in Fee-farm, rendering to the Abbot and his Successors, Twenty pounds yearly Rent; If all the Monks dye, this Rent determined, because there is none that can have it: It lies not in Tenure, and therefore cannot Escheat; and though new Monks may be made, it must be by a new Creation wholly.

In vacancy of  
a Parson or  
Vicar, the Or-  
dinary, ex of-  
ficio, shall cite  
to pay the  
Tithes. Fitz.  
N. Br. Consulta-  
tion Lett. G.

This Case agrees exactly with the Grant of a Rent or other thing which lies in Grant, pur auter vie, the Grantee dying, the Rent determines, though it were a good Grant, and enjoyed at first, yet when after none can have it, it is determined. So was the Rent to the Abbot, and his Successors, a good Rent, and well enjoyed. But when after all the Covent died, so as none could have the Rent, for the Body Politique was destroyed, the Rent determined absolutely.

By this I hold it clear, That if a man demise Land to another, and his Heirs habendum pur auter vie, or grant a Rent to a man and his Heirs, pur auter vie, though the Heir shall have this Land or Rent after the Grantors death, yet he hath it not as a special Occupant (as the common expression is) for if so, such Heir were an Occupant, which he is not, for a special Occupant must be an Occupant, but he takes it as Heir, not of a Fee, but of a descendible Freehold; and not by way of limitation, as a Purchase, to the Heir, but by descent, though some Opinions are that the Heir takes it by special limitation; as when an Estate for life is made, the Remainder to the right Heirs of J. S. the Heir takes it by special limitation, if there be an Heir when the particular Estate ends. But I see not how, when Land or Rent is granted to a man and his Heirs, pur auter vie, the Heir should take by special limitation after the Grantors death, when the whole Estate was so in the first Grantor, that he might assign it to whom he pleas'd, and so he who was intended to take by special limitation after the Grantors death, should take nothing at all.

But to inherit as Heir a descendible Freehold, when the Father or other Ancestors had not dispos'd it, agrees with the ancient Law, as appears by Bracton, which obiter in Argument is denied in *Walsingham's Case*.

Si autem fiat donatio sic, Ad vitam donatoris donatorio & heredibus suis si donatorius premoriatur heredes ei succedent, tenendum ad vitam donatoris, & per Assisam mortis Antecessoris recuperabunt qui obiit ut de feodo. Bract. l. 2. de acquirendo rerum dominico, c. 9.

Here it is evident, That Land granted to a man and his Heirs for the life of the Grantor, the Grantee dying in the life of the Grantor, the Heirs of the Grantee were to succeed him, and should recover by a Writ of Mordant in case of Abatement (which infallibly proves the Heir takes by descent) who died seisd as of a Fee, but not died seisd in Fee.

1. Hence I conclude, That if a man dye seisd, pur auter vie, of a Rent, a Tithes, an Advowson in gross, Common in gross, or other thing, whereof there can be no Occupancy, either directly or by consequence, as adjuncts of something else by the death of the Grantee, in all these Cases the Grant is determined, and the Interest stands as before any Grant made.



2. If any man dye seisd of Land, pur auter vie, as also of many of these things in gros, pur auter vie, by distinct Grant from the Land. The Occupant of the Land shall have none of these things, but they are in the same state, and the Grants determine as if the Grantee had died seisd of nothing whereof there could be any occupancy.

But I must remember you, that in this last part of my Discourse, where I said, That if a Rent, a Tithe, a Common or Advowson in gros, or the like, lying in Grant, were granted pur auter vie, and the Grantee died, living Cestuy que vie that these Grants were determin'd, my meaning was, and is, where such Rent, Tithe, or other things, are singly granted, and not where they are granted, together with Land, or any other thing out of which Rent may issue, with Reservation of a Rent out of the whole.

For although a Rent cannot issue out of things which lye in Grant, as not distrainable in their nature, yet being granted together with Land, with reservation of a Rent, though the Rent issue properly and only out of the Land, and not out of those things lying in Grant, as appears by Littleton; yet those are part of the Consideration for payment of the Rent, as well as the Land is.

Cok. Litt. f.  
142. a. 144. a.

In such case when the Rent remains still payable by the Occupant, it is unreasonable that the Grant should determine as to the Tithe, or as to any other thing lying in Grant, which passed with the Land as part of the Consideration for which the Rent was payable, and remain to the Lessor as before they were granted; for so the Lessor gives a Consideration for paying a Rent which he enjoys, and hath notwithstanding the Consideration given back again.

And this is the present Case, being strip and singled from such things as intricate it: That Doctor Mallory, Prebend of the Prebendary of Woolney, consisting of Glebeland, a House, Barns, and Tithe of Woolney, and thereof seisd in the right of his Prebendary, makes a Lease to Astly of the Prebend. una cum the Glebe, House, Barn, and Tithe for Three Lives, rendering the accustomed and ancient Rent of Five pounds Twelve shillings: Astly demiseth to Ta-

VERNER

verner the House, Glebe, and Barn for a year, reserving Twenty shillings, and dies, the Cestuy que vies living.

As I concluded before, Taverner is Occupant of the House, Barn, and Glebe-land, and consequently lyable to pay the whole Rent, being Five pounds twelve shillings yearly, though the Land, House, and Barn be found of the yearly value of Twenty shillings only; but because the Rent cannot issue out of Tithes, or things that lye in Grant, it issues only out of the House, Barn, and Land which may be distrain'd on.

2. If Taverner, being Occupant of the Land, shall not have the Tithes which remain'd in Aftly, according to his Lease for three Lives at the time of his death, and whereof by their nature there can be no direct Occupancy. It follows, that the Lease made by Doctor Mallory is determin'd as to the Tithe, for no other can have them; yet continues in force as to the Land and House, and all the Rent reserv'd, which seems strange, the Land and Tithe being granted by the same Demise for three Lives, which still continue: yet the Lease to be determined as to part.

3. Though the Rent issue not out of the Tithe, yet the Tithe was as well a Consideration for the payment of the Rent, as the Land and Houses were; and it seems unreasonable that the Lessor, Doctor Mallory, should by act in Law have back the greatest Consideration granted for payment of the Rent, which is the Tithe, and yet have the Rent wholly out of the Land by act in Law too, which cannot yield it.

4. Though Doctor Mallory could not have reserv'd a Rent out of the Tithe only, to bind his Successor upon a Lease for Lives, more than out of a Fair, though it were as the ancient Rent, and had been usually answered for the Fair; as is resolv'd in Jewel Bishop of Sarum's Case: Yet in this Case, where the Tithe, together with Land, out of which Rent could issue was demis'd; for the accustomed Rent, the Successor could never avoid the Lease, either in the whole, or as to the Tithe only.

Jewel's Case  
5 Rep.

This

<sup>3</sup> Eliz. c. 10. This seems clear by the Statute of 13 Eliz. cap. 10. which saith, All Leases made by any Spiritual or Ecclesiastical persons, having any Lands, Tenements, Tithes, or Hereditaments, parcel of the Possessions of any Spiritual Promotion, other than for One and twenty years, or three Lives, whereupon the accustomed yearly Rent, or more, shall be reserv'd, shall be void.

Coke's Litt.  
f. 142. a. f. 144.  
a.

Whence it is apparent, this Statute intended that Leases in some sense might be made of Tithes for One and twenty years, or Three Lives, and an ancient Rent reserv'd; but of a bare Tithe only a Rent could not be reserv'd, according to Jewell's Case: for neither Distress nor Assise can be of such Rent, though an Assise may be de Portione Decimarum, as is clear by the Lord Dyer, 7 E. 6. and the difference rightly stated.

Therefore a Lease of Tithe and Land, out of which a Rent may issue, and the accustomed Rent may be reserv'd, must be good within the intention of the Statute, or Tithe could in no sense be demis'd.

5. Taverner the Lessee being Occupant here by his possession becomes subject to the payment of the Rent, to Waste, to Forfeiture, Conditions, and all things that Asly the Lessee, or his Assignee, if he had made any, had been subject to: Also

Coke's Litt.  
41.

He must claim by a que Estate from Asly, he must averr the Life of Cestuy que vie, so as he becomes, to all intents, an Assignee in Law of the first Lessee.

6. Without question, the Occupant being chargeable with the Rent, shall by Equity have the Tithe, which was the principal Consideration for payment of the Rent, when no man can have the benefit of the Tithe but the Lessor, Doctor Mallory, who gave it as a Consideration for the Rent, which he must still have. Therefore

I conceive the Reason of Law here ought necessarily to follow the Reason of Equity; and that the Occupant shall have the Tithe, not as being immediate Occupant of the Tithe whereof no occupancy can be, but when by his possession of the Land he becomes Occupant, and the Law casts the Freehold upon him, he likewise thereby becomes an Assignee in Law of Asly's Lease and Interest, and consequently of the Tithe.

An ancient Rent reserv'd within the Statute of 1. 02 13. of the Queen upon a Lease of One and twenty years, 02 Three Lives, is by exprels intention of that Statore a Rent for publique use and maintenance of Hospitality by Church-men, as is resolv'd in *Elfenore's Case*, the 5. Rep. and therefore if the Lessee provide not an Assignee to answer the Rent to the Successors of the Lessor for the ends of that Law, the Law will do it for him, and none fitter to be so than the Occupant, in case of a Lease pur autre vie, as this is. Elfenore's C.  
5. Rep.

And if the Occupant, being Assignee, hath pass'd all his Estate and Interest to the Plaintiff, the Plaintiff hath good cause of Action for the Tithes converted by the Defendant.

Pasch. 22 Car. II. Judgment for the Defendant. Three Justices against the Chief Justice.



*Trin. 20 Car. II. C. B. Rot. 2043.*

*Harrison versus Doctor Burwell.*

In a *Prohibition*, for his Marriage with *Jane*, the Relict of *Bartholomew Abbot*, his Great Uncle.

The Questions are ;

- Quest. 1. **W**Hether the marriage of Thomas Harrison the Plaintiff, with Jane his now wife, being the Relict of Bartholomew Abbot his great Uncle, that is, his Grand-fathers Brother by the Mothers side, be a lawful marriage within the Act of 32 H.S. cap. 38 ?
- Quest. 2. Admitting it to be a lawful marriage within the meaning of that Act, Whether the Kings Temporal Courts are properly Judges of it, because the unlawfulness, or lawfulness of it, by that Act, doth depend upon its being a marriage within or without the Levitical Degrees? For if within those Degrees, it is not a lawful marriage by that Act. And the right knowledge of marriages within or without those Degrees, must arise from the right knowledge of the Scriptures, of the Old Testament, specially the Interpretation of which hath been, and regularly is of Ecclesiastick Conizance, and not of Lay or Temporal Conizance in regard of the Language wherein it was writ, and the receiv'd Interpretations concerning it in all succession of time.
- Quest. 3. Admitting the Kings Temporal Courts have by that Act of 32. or any other, special Conizance of the Levitical Degrees, and of marriages within them: And though this be no marriage within the Levitical Degrees (it being articulated in general to be an Incestuous marriage) Whether the Temporal Courts of the King can take Conizance in general, that it is not an Incestuous marriage, by the Act of 32 H. 8. and consequently prohibit the questioning of it in the Ecclesiastical Courts? Because the words of that Act are, That no marriage shall be impeached (Gods Law except) without the Levitical Degrees, and therefore within

within the meaning of that Act: Some marriages might be impeach'd according to Gods Law, though such marriage were out of the Levitical Degrees, whereof this may be one.

As to the first Question, The marriage of Harrison and Jane Resp. 1.  
his wife, is a lawful marriage, by the Act of 32 H. 8. cap.  
38.

As to the Second, I hold the Judges of the Temporal Courts Resp. 2.  
have, by that and other Acts of Parliament, full Conizance of  
marriages within or without the Levitical Degrees.

As to the Third, I hold that, as the Law stands at this time, Resp. 3.  
the Kings Temporal Courts at Westminster have full Conizance  
what marriages are incestuous, or not, according to the Law of  
the Kingdom, and may prohibit the Ecclesiastick Courts from  
questioning marriages, as Incestuous, which the said Courts  
in their Judgment shall conceive not to be so. Yet I shall  
agree, the Ecclesiastick Courts may proceed in order to Di-  
vorcement and punishment concerning divers marriages,  
and the Kings Courts at Westminster ought not to prohibit  
them, though such marriages be wholly without the Levitical  
Degrees.

I shall begin in some measure, first to clear the Second  
Question, viz. Whether the Kings Temporal Courts have any  
Conizance of the Subject matter, namely, what marriages are  
within or without the Levitical Degrees? Questions of that na-  
ture being (as must be confessed) regularly to be decided by  
the Law Divine, whereof the Ecclesiastick Courts have gene-  
rally the Conizance: For it were improper for us to resolve a  
Question in a Law, when it was left to an after Inquiry, whe-  
ther we had any Conizance of, or skill in that Law, by which  
the Question was to be determined.

There was a time when the Temporal Courts had no Coni-  
zance of lawful or unlawful marriages; so was there a time  
when the Ecclesiastical Courts had no Conizance of matters Te-<sup>Hensloes C.</sup>  
stamentary and probat of Wills, but the Law-making power of <sup>9. Rep.</sup>  
the Kingdom gave them that which they had not before, and  
the same hath given the Temporal Courts this now, which they  
had not in former times. By Conizance in this sense, I intend  
Jurisdiction and Judicial Power, as far as it extends, concerning  
the lawfulness of marriages, which an Act of Parliament hath  
given them.

Notwithstanding it will be said, They want knowledge or skill in the Law by which it must be determined what are, or are not, the Levitical Degrees; for they are not studied in that Divine Law, they want skill in the Original in which it was written, and in the History by which it is to be interpreted.

As specious as this seems, it is a very empty Objection; for no man is supposed necessarily ignorant of a Law which he is bound to observe. It is irrational to suppose men necessarily ignorant of those Laws, for breach of which they are to be punished, and therefore no Canon of Divine or Human Law, ought to be supposed unknown to them, who must be punished for transgressing them. We are obliged not to marry in the prohibited Degrees, not to be Heretical, or the like; therefore we are supposed to know both.

Nor is it an Exception to disable a man of having any Church Dignity whatever, that he is not knowing in the Hebrew or Greek Tongue. All States receive the Scriptures in that Language wherein the several States think fit to publish them for common use; and it is but very lately that the Christian Churches have become knowing in the Original Tongues wherein the Scriptures were written; which is not a knowledge of obligation, and required in all, or any, but acknowledged accidental, and enjoy'd by some.

If it were enacted by Parliament, That matters of Inheritance of Theft and Murther, should be determined in the Courts of Westminster, according to the Laws of Moses, this Objection would not stand in the way, no more can it in this particular concerning Incestuous marriages.

The Laws of one people have frequently been transferred over and become the Laws of another: As those of the Twelve Tables from Greece to Rome; in like manner those Laws of the Rhodians for Maritime Affairs, made the Law of the Romans; the Laws of England into Ireland: and many such might be instanced.

As another Iymn of this Objection, it is said, This Act 13 H. 8. seems rather a directing Act, how the Courts Ecclesiastical should proceed touching marriages out of the Levitical Degrees, than an Act empowering the Temporal Courts to prohibit their proceeding.

When the King's Laws prohibit any thing to be done, there are regular ways to punish the Offender: As for common Offences by Indictment or Information. Erronious Judgments are remedied by

by Writs of Error or Appeal. Incroaching Jurisdiction by Courts where no Writ of Error lies, is corrected by the King's Writs of Prohibitions. It is moſt proper for the King to hinder the violating of his Laws, by impeaching of marriages which the Law will not have impeach'd, by incroaching Jurisdiction, as to hinder them from impeaching or drawing into question Contracts for Lands, or other things whereof they have not Conſiſtance. And the King hath never otherwiſe remedied that fault againſt his Laws, but by his Prohibitions out of his Courts of Juſtice.

Now is it conſonant to Law or common Reaſon, That they who offend, by incroaching Jurisdiction againſt Law, ſhould be the redreſs allowed by Law only againſt ſuch incroachment, which were to provide againſt doing wrong by him who doth it.

By the Act, no perſon of what eſtate or condition ſoever, is to be admitted to any of the Spiritual Courts, and to any Proceſs, Plea, or Allegation, contrary to the Act. Rep. 1, 2. parts but that was Rep. again 1 E. 1.

This Act therefore never intended the Eccleſiaſtick Courts ſhould have any Judicial power to determine or judge what marriages were within or without the Levitical Degrees, contrary or not contrary to the Act, when it admits not any Proceſs, Plea, or Allegation in a Spiritual Court, contrary to the Act.

For it is impoſſible that Court ſhould have Conſiſtance to determine the lawfulness or unlawfulness of a marriage, which is forbid to admit Proceſs, Plea, or Allegation againſt ſuch marriage, if it be lawful.

1. This marriage not prohibited in the 18. of Leviticus, nor the ſame degree with any there prohibited.

2. If marriages, neither prohibited in terminis in Leviticus, nor being in the ſame degree with a marriage there prohibited ſhould be unlawful, there would be no ſtop or terminus of unlawful marriages.

3. The 20. of Leviticus prohibits no other marriages than the 18. of Leviticus doth, but appoints the puniſhments, which the Eighteenth doth not.

4. Not now to determine, Whether the marriages mentioned within Leviticus 18. be only prohibited, or marriages with in the degrees there mentioned: The Talmudiſts hold the firſt, the Karaites the ſecond ſtrongly: who in moſt concur with our Parochial Table.

5: This



5. This marriage not prohibited by the Canons 1 Jac.Can.99. nor contained in the Parochial Table.

6. Marriages between the Children and Parents in the ascending line intermediately prohibited; and for what Reasons.

7. How the words (Gods Law except) in the Act of 32 H. 8. and the words (or otherwise by Holy Scripture) in the Act of 28 H. 8. c. 16. are to be intended.

8. The Defendant doth not Article, That the Uncle, Bartholomew Abbot, did carnally know Jane his wife, and then the marriage is not against Gods Law, by 28 H. 8. c. 7

The mischief by the Act of 32 H. 8. was, That the Bishop of Rome had always troubled the meer Jurisdiction and Regal Power of the Realm of England, and unquieted the Subject by making that unlawful, which by Gods word is lawful, both in marriages and other things.

Therefore it is thought convenient for this time, that two things be with diligence provided for.

The first was against dissolution of marriages consummate with bodily knowledge, upon pretence of Pre-contracts.

The other by reason of other prohibitions, to marry than Gods Law admitteth; As in Kindred or Affinity between Cosen Germans, and so to the fourth and fifth Degree; which else were lawful, and be not prohibited by Gods Law. — Again, that freedom in them was given by Gods Law.

To remedy these two mischiefs, All marriages consummate with bodily knowledge between lawful persons, and all persons are declared to be lawful to marry which be not prohibited by Gods Law, are made lawful by Authority of Parliament, notwithstanding any Pre-contract, &c.

But this part of the Clause to make good marriages notwithstanding pre-contracts, is repeal'd, 2 E. 6. c. 23. 1 El. c. 1.

The other Clause remains, which declares all persons lawful to marry who are not prohibited by Gods Law, but is of no use to remedy the second mischief.

For if the Pope shall expound what persons of Consanguinity or Affinity are prohibited by Gods Law to marry, he will expound Gods Law as the Canons and Popes formerly did.

That by the Word of God no man is to uncover the nakedness of the Kindred of his Flesh, and therefore marriage is prohibited as far as there are names of Kindred and memory, which is the reason of the Old Canon Law to prohibit to the Seventh Degree, for further they had not names of Kindred. And if it would have remedied the Inconvenience, to say in the Act, That all mar-

marriages were lawful, not prohibited by Gods Law, and leave the Pope then to resolve what was prohibited by Gods Law, it was to no purpose to have added more words to the Act, but to have ended ther, and the inconvenience of prohibiting marriages, for Consanguinity or Affinity, when God did not prohibit, had still remain'd.

But the Act goes on, And that no Prohibition or Reservati-  
 on (Gods Law except) should impeach any marriage for Con-  
 sanguinity or Affinity, for so it must be understood without the  
 Levitical Degrees, for that was the second thing specially to be  
 provided for; as the Act saith.

Not that no marriage should be impeached without the Le-  
 vitical Degrees, which the Act intended not at all, nor was it  
 the thing to be provided for, but not to be impeached for Kin-  
 dred or Affinity without the Levitical Degrees; as in Cosen Ger-  
 mans, and so forth.

For who will say, That by those words no marriage shall be  
 impeached without the Levitical Degrees, the Act intended that  
 no marriage for natural Impotency, for plurality of Husbands  
 or Wives for Adultery, and the like, should not be impeached,  
 though it were out of the Levitical Degrees.

For the Act had no aspect upon such marriages, but to hinder  
 impeaching marriages for Consanguinity or Affinity, without the  
 Levitical Degrees, which was the second thing by the Act, to be  
 at that time diligently provided for.

Therefore those words, Gods Law except, must referr to such  
 other marriages, as by Gods Law might be impeach'd, and not  
 to any for Consanguinity or Affinity, for had not those words been  
 the generality of the Expression, No marriage shall be impeach'd  
 without the Levitical Degrees, had excluded the impeaching mar-  
 riages for plurality of Wives or Husbands, at a time for Impo-  
 tency and for Adultery, as Sir Edward Coke observes, at the  
 end of his Comment upon this Statute in his Second Institutes.

But if those words, No marriage shall be impeach'd, Gods  
 Law except, shall be understood, That no marriage should  
 be impeach'd, not prohibited by the Scripture, viz. Gods Law.  
 Then

1. There was no use of naming the Levitical Degrees at  
 all.

2. The

2. The Pope would have interpreted the Scripture ( which belong'd to him ) to have prohibited all marriages between Kindred, as anciently, and then the end of the Act had been frustrate.

3. Wherein was the Kings Jurisdiction and Regal Power righted, if prohibiting of marriage for Consanguinity or Affinity, were to be proceeded in as formerly.

But all marriages without the Levitical Degrees, being made lawful, because the Secular Judges by the Act of 28 H. 8. c. 7. had certain Conizance of them both expressly, and in Consequence they were no more of Ecclesiastical Conizance than Contracts concerning Land or Lay Chattels were, and therefore the questioning of them to be prohibited as the other.

This was to complain of the Pope as a wrong doer against the Law of God, viz. Holy Scripture, and diligently to provide remedy for it according to the Scripture, whereof the wrong doer was the only decisive and infallible Interpreter, as the Church then believed: which is redressing a wrong by the Judgment of the wrong doer.

Anciently, before any Act of Parliament alter'd the Law, the lawfulness or unlawfulness of marriages, and which were incestuous, which not, were only of Ecclesiastical Conuzance, and the Temporal Courts medled not to ratifie or prohibit any marriage.

#### The Statute de Circumspecte agatis.

13 E. 1.

Circumspecte agatis de Negotiis tangentibus Episcopum Norwic. & ejus Clerum non puniendo eos, si placitum tenuerint in Curia Christianitatis de his quæ mere sunt spiritualia, viz. de Correctionibus quas faciant pro mortali peccato, viz. pro fornicatione, adulterio, & hujusmodi.

Mag. Chart.  
Cok. f. 488.  
upon that  
Statute.

Sir Edward Coke in his Comment upon this Statute, and those words, viz. pro fornicatione, adulterio, & hujusmodi, which by the express words of the Statute are said to be mere Spiritualia, saith, and truly, That the word hujusmodi must be understood of offences of like nature with Fornication and Adultery; as for solicitation of a womans Chastity, which is less than Fornication or Adultery; and for Incest, which is greater. So as the Conuzance of Incest was meerly Spiritual, and concern'd not the lay Law at all originally.

2. There

2. There was no time wherein some marriages were not lawful, and others unlawful, but the Judgment of both was meerly Ecclesiastick; insomuch, That if a man were question'd in the Spiritual Court for a lawful marriage, the Temporal Law would afford him no Remedy by Prohibition, or otherwise, because they neither had any Jurisdiction of that Subject matter, nor were presumed to have any knowledge in those Laws, by which such matters were to be determined, which were the Laws of God, contained in the Scriptures and the Canon Law, either by Councils, or the Popes Decretals admitted in the Kingdom.

3. Although the Canon Law had been formerly relaxed, and the lawfulness of marriage enlarged by Councils and Decretals, as they might be, and were, so as sundry marriages became lawful, which were before Canonically prohibited.

Thus it happen'd in the Council of Lateran, under Pope Innocent the Third; In quo Sanctum prohibitionem Copulæ Conjugalis quantum Consanguinitatis & Affinitatis gradum, non excedere, quoniam in ulterioribus gradibus, jam non potest absque gravi dispendio hujusmodi prohibitio generaliter observari; (for before many Degrees beyond the fourth were forbid) yet could the Common Law take no notice of this enlargement of lawful marriages, nor did not.

Concil. Lateran. sub Innocent. 3. 1215. Seld. de Jure Natur. l. 608.

Because the lawfulness still depended upon the Law Divine, and the Canon Law, as then it stood by that alteration whereof the Secular Judges had no Conuzance or Skill to Judge; nor is there any Prohibition in the Register, or elsewhere to be found, concerning the questioning of any marriage in the Spiritual Court, in all the time preceding the Acts of Parliament, nor long after some of them.

But if at the time of this Council it had been enacted by Parliament, That all marriages should be lawful after the fourth Degree from Cosen Germans inclusively, then if such marriages had been questioned in the Spiritual Courts, a Prohibition had lain, because a marriage was questioned which an Act of Parliament had expressly made lawful, and whereof the Secular Judges were the most Conuzant.

But if then, by an Act of Parliament, all marriages had been made lawful, not prohibited by Gods Law, or not prohibited in the Old or New Testament, though by that Act all marriages prohibited by Canon Law, and not by Scripture, had been made lawful; yet the Temporal Courts had thereby no manner of Jurisdiction in Cases of Marriage, because the lawfulness of them were still to be measured by a Law out of their

¶

Conu-



Conuzance, that is, by the Divine Law : And such an Act of Parliament was directory only to the proceeding of the Spiritual Judges in Cases of Matrimony, and no way advancing the Jurisdiction of the Temporal Courts, nor enabling them to prohibit the questioning of any marriage.

25 H.8.c.22.  
28 H.8.c.7.  
28 H.8.c.16.  
32 H.8.c.38.

The Law and Reason of it being thus stated before the Acts of Parliament of 25 H.8.c.22. 28 H.8.c.7. 28 H.8.c.16. 32 H.8.c.38. We will see what alteration was induc'd by these respective Statutes in order.

And first the Act of 25 H. 8. hath these words—— Since many inconveniences have fallen, as well within this Realm, as in others, by reason of marrying within the Degrees prohibited by Gods Law,

(That is to say)

The Son to marry the Mother.  
The Son to marry the Step-mother.  
The Brother to marry the Sister.  
The Father to marry his Sons daughter.  
The Father to marry his Daughters daughter.  
The Son to marry his Fathers daughter, procreated and born by his Step-mother.  
The Son to marry his Aunt, his Fathers Sister or Mothers Sister.  
The Son to marry his Uncles Wife.  
The Father to marry his Sons Wife.  
The Brother to marry his Brothers Wife.  
A man to marry his Wives daughter.  
His Wives Sons daughter.  
His Wives Daughters daughter.  
His Wives Sister.

Which Degrees 1. are the Degrees expressly mentioned in the Eighteenth Chapter of Leviticus, and were for matter and language by this Act first made of Lay Conuzance.

It declares those Marriages to be plainly prohibited by Gods Law, that notwithstanding they have sometimes proceeded by colour of Dispensation by mans power, which ought not to be ; For no man can dispense with Gods Law, as the Clergy in the Convocation, and most of the famous Universities of Christendome, have affirmed, &c.

Then

Then it enacts a Separation by definitive Sentence in the Spiritual Courts of the Kingdom, without Prohibition from, or Appeal to, *Rome* of ſuch marriages.

The next Act of Parliament concerning marriages prohibited, 28 H. 8. c. 7.

By which Act the former Act of 25. is repeal'd, not for the matter of the marriages there prohibited, as is ſaid in that Act, and therefore

In the ſame words, The marriages within thoſe Degrees are re-cited again, and declared to be prohibited by Gods Law.

But with theſe differences, that in the Prohibition,

1. Of the Sons marrying the Step-mother, is added, Carnally known by his Father.

2. In the Prohibition of marrying his Uncles Wife, is added, Carnally known by his Uncle.

3. In the Prohibition of the Father to marry his Sons Wife, is added, Carnally known by his Son.

4. In that of the Brother to marry his Brothers Wife, is added, Carnally known by his Brother.

5. In thoſe of marrying a mans Wives daughter, or her Sons daughter, or her Daughters daughter, is added, having the Carnal knowledge of his Wife. By this Act theſe Degrees were the ſecond time made of Lay Coniſance.

So Sir Edw. Coke refers the Levitical Degrees to this Act. Second Inſt. f. 683.

Another alteration in this Act from the former, is, That if any man carnally know any woman, all perſons, in any Degree of Conſanguinity or Affinity of the parties ſo offending, ſhall be adjudg'd to be within the ſaid Prohibitions, in like manner as if the parties ſo carnally knowing one another had been married. For example, If a man carnally know a woman, not marrying her, he is prohibited to marry her Daughter, or Daughters daughter, & c. converſo.

In all other Clauſes this Act, and the former of 25. are verbatim the ſame, and this Act is in force.

Observations upon thoſe two Acts 25 &  
28 H. 8.

1. That by neither of theſe Acts, no marriage prohibited beſore, either by Gods Law, or the Canon Law, differenc'd from it is made lawful.

2. That the marriages particularly declared by the Acts to be againſt Gods Law, cannot be diſpens'd with; but other marriages, not by the Acts declared in particular to be againſt Gods Law, are left, ſtatu quo prius, as to diſpenſations with them.

3. That neither of theſe Acts gave any Jurisdiction to the Temporal Courts, concerning marriages, more than they had beſore, but were Acts directory only to the Eccleſiaſtick proceeding in matters of marriage.

4. Neither of theſe Acts ſay or declare, That the Degrees rehears'd in the ſaid Acts, and thereby declared to be prohibited by Gods Law, are all the Degrees of marriage prohibited by Gods Law.

For take the words at moſt advantage for that purpoſe, viz. Since many inconveniences have fallen by marrying within the Degrees prohibited by Gods Law. That is to ſay,

The Son to marry the Mother, the Brother the Siſter, &c. and that the enumeration in the Act of prohibited Degrees, had gone no further than to the Degrees of Conſanguinity, not enumerating any Degrees of Affinity; as then it had been no Inference to conclude that there were no more prohibited Degrees by Gods Law intended by the Statute, than the Degrees of Conſanguinity only.

So now no Degrees being mentioned in the Statute to be prohibited by Gods Law, but thoſe which are expreſs'd, it cannot thence be concluded, That the Statute intended no other than thoſe to be prohibited by Gods Law.

For thoſe are therefore mentioned to be prohibited, becauſe they were Degrees ſignally expreſſed, and concerning which no queſtion or doubt could be made.

In the same manner is it if a Statute should say, Since many Inconveniences have happen'd, by doing things prohibited by the Kings Laws; that is to say, By Depopulation of Farms, by subtracting of Tithes, by committing Dilapidations, and of many other things forbidden by the Law.

It would not be concluded, That the things so enumerated, were all the things prohibited by the Kings Laws, no more can it that the enumerated Degrees of prohibited Marriages in the Act by Gods Law, are all the Degrees by Gods Law prohibited.

The next Statute is an Act of the same Parliament, 28 H. 8. 28 H. 8. c. 16 making invalid Licences, Dispensations, Bulls, and other Instruments purchas'd from Rome: Which Act hath these words;

That all Marriages solemnized within this Realm, or in any the Kings Dominions, before the Third day of November, in the Six and twentieth year of the King, whereof there is no Divorce had by the Ecclesiastick Laws of the Realm, and which be not prohibited by Gods Law, limited and declared in the Act made this present Parliament, for establishing the Kings Succession, or otherwise by Holy Scripture, shall be lawful and effectual by Authority of this present Parliament.

By this Act the Levitical Degrees are made the third time of Lay Concubance.

1. By this Law all Marriages made befoze that Third of November, 26 H. 8. no divorce being had, are made good and lawful.

2. All Marriages made befoze that time, and not prohibited in the Degrees limited and declared in the Act of 28 H. 8. c. 7. If the Act had rested there, and gone no further, had been made good; and if any of them had been questioned, a Prohibition would have lain out of the Temporal Courts, because the unlawfulness of marrying was restrained to the Degrees limited in 28 H. 8. c. 7. whereof the Temporal Judges had perfect Concubance, as of a lay Law.

But the Act going further, and saying, Prohibited by Gods Law, limited in the Act of 28. or otherwise by Holy Scripture, leaves, as is objected, all Concubance of Marriages as befoze, to the Ecclesiastick Courts, though not so amply.

So by those added words, Or otherwise by holy Scripture, the Act made all Marriages solemnized befoze that time, not prohibited by Holy Scripture, good and lawful; by which Act, though Marriages prohibited only by the Canon Law, divided from Scripture, were made good.



Yet the tryal was, Whether the Marriage was prohibited by Holy Scripture? which being only of Ecclesiastick Conizance, they only could judge of the lawfulness.

And that the Temporal Courts could by that Act no more judge what Marriage was lawful or Incestuous by the Holy Scripture, than what was Schism or Heresie by the Holy Scripture.

3. By this Act it is evident, The Law-makers thought some Marriages were, or might be prohibited by Gods Law, not limited in the Act of 28 H.8.

So if the Act had limited all Marriages lawful, but those forbidden in the Five Books of Moses, or in the Book of Moses called Leviticus, though the unlawfulness of Marriage had been more restrain'd under that expression, than under the general expression of Holy Scripture. Yet

Those Books being part of Holy Scripture, the Secular Judges had no more Conuzance of the parts than of the whole.

And so would it have been if the Act had restrained the unlawfulness of Marriage to the Eighteenth Chapter of Leviticus, that being a part of the Book called Leviticus, the Temporal Courts could have no more Conuzance of that part or Chapter of the Book, than of the whole Book. This I think is the full of the Objection.

30 H. 8. c. 28.

The last Law, and which is *Cardo Questionis*, as being pleaded by the Plaintiff Harrison in the Books, is the Act of 32 H. 8. cap. 38. consisting of several parts, some whereof are Repeal'd; as the branch concerning Pre-contracts.

I shall therefore examine that Act as it stands in force.

1. Marriages between Consen Germans, and all Marriages onwards between Collateral Consens, which were prohibited very far, before the Council of Lateran, and since it, those to the fourth Degree, to the making of this Act, are made lawful, and declared not to be against the Law of God, viz, in these words,  
—And be not prohibited by Gods Law.

6. Re:

2. Restraining of Marriage by reason of Carnal Knowledge within any of those Degrees, is expressly taken away, and the Marriages declared not to be against the Law of God. In these, Sir Edward Coke in his Comment upon this Statute in his Magna Charta, is express.

Coke's Mag.  
Chart. l. 6. § 4.

So if any Marriage within those Degrees shall be questioned as Incestuous in the Spiritual Courts, a Prohibition will lye upon this Act, because the Marriages, by one part of the Act, are declared expressly,

1. Not to be against the Law of God.

2. By another, All Marriages contracted between lawful persons, as we declare all persons to be lawful that are not prohibited by Gods Law to marry, are lawful.

Joining then those two Clauses together, That all Marriages are lawful, not prohibited by the Law of God; and that such Marriages of Cosen Germans, and so onwards, are not prohibited by Gods Law: It is manifest that Prohibitions will lye in such Cases.

But these Marriages concern not the Case in question.

The next Clause in the Act, and upon which the present Case stands,

That no Reservation or Prohibition (Gods Law except) shall trouble or impeach any Marriage without the Levitical Degrees.

The clear sense of which Clause must be, That all Marriages are lawful, which are not prohibited within the Levitical Degrees, or otherwise by Gods Law.

So as the prohibiting of Marriages within the Levitical Degrees, and within Gods Law, whereof the Levitical Degrees are a part, is no more or less in effect, than to say, All Marriages shall be lawful that Gods Law doth not prohibit.

Whence is collected, That of Gods Law in general, or of the Levitical Degrees in particular, being a part of that Law, the Temporal Judges had no Cognizance after this Act more than before, and that this Act, excepting in the matter of Marriages to the fourth Degree, and onwards, which it declares not to be against Gods Law, was only directory to the Ecclesiastick Courts, as the former Statutes were, and gave the Temporal Courts no Jurisdiction to prohibit questioning any Marriage but those of Cosen Germans and onwards.

But

But the Judges of the Temporal Courts have long since, and often, after the Act of 32 H. 8. granted Prohibitions for questioning marriages out of the Levitical Degrees, and thereby determined the lawfulness of such Prohibitions.

So as many Parliaments having past since Prohibitions granted in that kind, without complaint of it, as is likely, but certainly without redress for it. It is not safe, in a Case of publique Law, as this is, between the Spiritual and Temporal Jurisdiction, to change the receiv'd Law, nor do I think it is expected.

That being taken then as settled, That the Spiritual Courts may be prohibited to question marriages out of the Levitical Degrees.

The first question will be,

Whether any marriages be against Gods Law, but those within the Levitical Degrees? for if none else be, the Temporal Courts, having Conuzance of marriages within those Degrees, have consequently Conuzance of all marriages against Gods Law. Then must the words of the Statute,

No marriage shall be impeach'd ( Gods Law excepted ) without the Levitical Degrees, be understood thus :

No marriage shall be impeach'd ( Gods Law excepted, ) viz. his Law of the Levitical Degrees.

Cok. Litt. f.  
235. a.

The Authority which makes for this Exposition, is Coke in his Littleton, where these words are ;

For by the Statute of 32 H. 8. cap. 38. it is declared, That all persons be lawful (that is, may lawfully marry) that be not prohibited by Gods Law to marry ; that is to say, that be not prohibited by the Levitical Degrees.

By which evidently he makes all the Law of God which prohibits marriages, to be only the Levitical Degrees.

But I conceive clearly, There are other Laws of God prohibiting marriages to be made ; and if made, warranting their Dissolution ; and so intended to be by this Statute of 32 H. 8. besides the Law of God in the Levitical Degrees.

1. For persons pre-contracted to another, are prohibited by Gods Law to marry against such pre-contract.

2. Per-

2. Persons of natural Impotency for Generation, are prohibited to marry: For marriage being to avoid Fornication, if it be useleſs for that purpose, as natural Impotency is, it is as null.

So is the Case of Sabell, and another Case of one Bury, di-  
voic'd at the Suit of their Wives for Impotency. Dyer 2 El. 178

3. Plurality of Wives or Husbands is prohibited by Gods Law, the first being not prohibited by the Levitical Degrees.

And Sir Edward Coke, in the end of his Comment upon this Statute, notwithstanding the passage before in his Littleton, saith expressly, That marriages made with a person pre-contracted, or with an Impotent person, could not have been question'd in order to a Divorce, by reason of this Statute, but because such marriages are against Gods Law; yet are they all without the Levitical Degrees. This is the reason of the words, Gods Law except, for these marriages may be impeach'd, though out of the Levitical Degrees; this answers the words, or otherwise by Holy Scripture in 28 H. 8. c. 16. also. Cok. Mag. Ch. 1687. a.

In what sense any *Marriages* and *Copulations* of Man with Woman, may be said to be Natural, and in what not.

In the first place, to speak strictly what is unnatural, it is evident that nothing which actually is, can be said to be unnatural, for Nature is but the production of effects from causes sufficient to produce them, and whatever is, had a sufficient cause to make it be, else it had never been, and whatsoever is effected by a cause sufficient to effect it, is as natural as any other thing effected by its sufficient cause. And in this sense nothing is unnatural but that which cannot be, and consequently nothing that is, is unnatural, and so no Copulation of any man with any woman, nor an effect of that Copulation by Generation, can be said unnatural; for if it were, it could not be, and if it be, it had a sufficient cause.

There are other Males and Females, differing in their Species, which never have Appetite of Generation to each other, and consequently can never have the effect of that Appetite, the kinds whereof are innumerable.



Between these the acts of Generation are so unnatural, that they are impossible, and no restraint is necessary to such by Laws, or by other Industry.

### Marriages forbidden in *Leviticus* lawful before.

Those marriages and carnal knowledge which are amongst the most Incestuous enumerated in *Leviticus* the Eighteenth, were so far from being unnatural in primordis rerum, that they were not only natural, but necessary, and commanded in that Command of Increase and Multiply, that is, the Carnal knowledge between Brothers and Sisters.

For the World could not have been peopled, but by Adams Sons going in to their Sisters, being Brothers and Sisters by the same Father and Mother, or by a more incestuous coupling than that; and if such Carnal knowledge had been absolutely unnatural in any sense, it had never been either lawful or necessary: For whatsoever is simply and strictly unnatural at any time, was always unnatural and unchangeable.

### Marriages lawful after restoring the World in *Noah*.

After the peopling of the World, first from Adam, then from Noah, and to the time of Moses giving the Levitical Law: Many other marriages prohibited in the Levitical Degrees, were not only lawful, but prosecuted with the most signal benedictions and promises of God.

Gen. 20. v. 12. As the marriage of Abraham with Sarah, who was his Sister, that is, the daughter of his father, but not the daughter of his mother.

So is his answer to Abimelech, and so is the Tradition of her Genealogy.

But by the Eighteenth of *Leviticus*, the marriage of the Sister by the Father is prohibited to the Son, viz.

Lev. 18. v. 7. Thou shalt not discover the shame of thy Sister, the Daughter of thy Father, or the Daughter of thy Mother, whether she be born at home, or born without, &c.

The next instance is of Amram, the Father of Moses and Aaron, who married Jochabed his Fathers Sister, namely the Sister of Reuhen.

And

And *Amram* took *Jochebed* his Fathers sister to his Wife, and she bare him *Aaron* and *Moses*. Exod. 6. v. 20.

Which marriage is prohibited in the 18. of *Leviticus*, viz.

Thou shalt not uncover the shame of thy Fathers Sister, for she is thy Fathers Kinswoman. Lev. 18. v. 12.

Jacob had two Wives at the same time, *Leah* and *Rachel*, being Sisters; which is a known Story. Gen. c. 29. &c.

But by the Eighteenth of *Leviticus* — Thou shalt not take a Wife with her Sister, during her life, to vex her in uncovering her shame upon her. Lev. 18. v. 18.

Before the Prohibitions in the Eighteenth of *Leviticus*, and then, and after, a man not only might, but ought, in some cases, to marry his Brothers wife, that was, if his brother died childless, as appears in the History of *Tamar* and *Judah* before the Levitical Law.

Then *Judah* said to *Onan*, Go into thy Brothers wife, and do the Office of a Kinsman unto her, and raise up Seed unto thy Brother. Gen. 38. v. 8, 9.

*Onan* would not (after a strange manner) wherefore the Lord slew him. Lev. 18. v. 16.

But in the Eighteenth of *Leviticus* it is said, Thou shalt not discover the shame of thy Brothers wife, for it is thy Brothers shame. Deut. 25. v. 5.

The sequel of that History is well known, and these Instances fully prove, That those several marriages before instanced, and which are prohibited in the Eighteenth of *Leviticus*, were lawful before, and practised by the most remarkable men for holiness of life.

*Nachor*, the brother of *Abraham*, married *Milcah*, his brother *Harans* daughter; so the Uncle married the Niece; Gen. c. 11; v. 29, 30.

To this may be added, That children from nature know not their parents or kindred from other people, and therefore their Acts, whatever they be, whether of marriage or otherwise, are (regarding nature only) as indifferent towards their Parents and Kindred, as towards any other men or women.

The Parents may possibly know their Children, and more especially the Mother, by a knowledge that is natural; but it is impossible the Children should naturally know their Parents: Therefore they cannot naturally know that they do transgress towards their Parents.

But the knowledge of our Parents is subsequent to nature, and not coequal with her, and ariseth from Civil Laws, Education, and common Reputation, not from Nature; we take those for our Parents whom the Laws denote to be so.

Seld. de Jure  
naturali &  
gentium jux-  
ta discipli-  
nam Ebraeo-  
rum l. 5. c. 11.

The Theban Story of Oedipus and Jocasta his Mother, is an obvious Example in this kind, where both ignozantly married each other, and had Issue between them. Of the marriage with the Mother, the Sister, the Step-mother, anciently permitted in Persia, Greece, Egypt, and other places of the East. Vide.

Besides, what is unnatural to man, qua man, must be so to all men, and at all times: But what is unnatural to this or that individual man, is unnatural only to him, and only for the time it is so, and not to other men.

### How things become unnatural by Custom.

A second way by which mens Acts are said to be unnatural (and are so in some measure) is, When Laws Divine or Humane, do supervene upon mans original nature with great penalty for transgressing them. Mens education, à *teneris Annis*, to observe those Laws, the infamy attending their violation, and the religious customary observance of them, implant a horroir and aversness to break them; so that by long custome they are not observ'd, only to avoid the punishment, and as things which were otherwise indifferent, but are observed, from an aversness and loathing, begot by Custome, to transgress them. That though men were secure from the punishment, if they broke them, yet Nature denies all appetite and inclination to violate them.

This kind of secondary Nature is eminently seen in mens aversness from some things for Food, which Custome had made detestable. As eating the Flesh of Men, Bears, Horses, Dogs, Cats, and many other things which nauseate men, and are offensive upon no other account than that Custome hath made them so, not primitive Nature, and which upon tryals of Famine have been found both eatable and nourishing; and by contrary Custome among some other Nations of People, are as desirable as other Food, as is exemplified in the Anthropophagi, the Cannibals or Men-eaters.

In this secondary way, the Copulation with the Mother, Sister, and the like, do become odious and reluctant to Nature, and generally are so where Humanity is well planted, which in the original state of nature, and without those induc'd Laws, Education, and Custome of Manners, had been as indifferent as with other

other women. To this purpose there is a passage, and a true one, in Simplicius, speaking when the Grecians began to desert their Incestuous marriages. — Jam cum lex & consuetudo, Seld. de Jure  
 sororis & fratriæ consuetudine interdicat, Appetitiones non secus ac naturali, c. 11.  
 ab ipsius naturæ Imperio suppressæ, ita prorsus sunt immobiles, f 605.  
 nisi forte aliquos furoris Intemperies, & diræ scelerum ultrices agitent.

So Lucan of Incest with the Mother,

Luc. l. 8.

— Cui fas implere parentem  
 Quid reor esse nefas? —

To this secondary Nature, hath that of St. Paul to the Co- 1 Cor. c. 11.  
 rinthians reference, where he saith, v. 13, 14, 15.

Doth not Nature it self teach you, That if a man have long hair,  
 it is a shame unto him? Where no other Nature can be under-  
 stood but Manners and Custome.

And soz this are the Egyptians upbraidèd in the Prophets Isai-  
 ah and Jeremy soz thre Bestiality, in Copulation with thre near-  
 est Relations; as is most frequent in Stozy.

That their Flesh was like the Flesh of Horses, and their Issue as  
 the Issue of Asses, They not observing any order of Coitus, other  
 than was found in Horses and Asses; which is the true meaning  
 of that place. In this way it is true, that such Incestuous  
 marriages are unnatural, and so never made by those in whom  
 Custome hath begot a horroz and aversion to them; but on the  
 other side, to them which have it not, there is no unnaturalness  
 in them; soz Nature originally hath not implanted that aver-  
 sion in them, noz Custome prevailed to beget it, as it hath in  
 the others.

Of



## Of transgressing natural Laws, and in what sense that is to be understood.

A third way of mens acting unnaturally is, when they violate Laws coeal with their original being, though the Laws be but positive Divine, or positive Human Laws, and not of nature, primarily, nor in any other sense, intelligible to be Natural Laws. But that they bind men as soon as men can be bound; and no Law can possibly precede them:

A second reason of their being natural Laws properly, is, because mans nature must necessarily assent to receive them as soon as it is capable of assenting, and hath no power to dissent from them; for a man hath no power to dissent from, or not to assent to his own preservation, or not to dissent from his own destruction: But not to assent to the will, that is, to the Laws, of an Infinite Power, to hurt and benefit, is, to assent to his own destruction and infinite hurt, and to dissent from his own preservation and infinite benefit; for infinite power can hurt or benefit as it pleaseth. Therefore to assent to the Laws of the Deity is natural to man.

The Jews, with great constancy, speak of such Laws as given to all mankind in this particular matter of marriage, and carnal mixture, and describe them traditionally through all antiquity, as binding all Nations and People by Gods Precept, and therefore call them, among others so given, *Leges Noachidarum*, or the Laws of all the Sons of Noah, by which men were from the beginning prohibited.

1. Marriage or Copulation with their Mother.
2. With the Fathers wife.
3. With a Sister by the same Mother, or with a Soror uterina.
4. With the Wife of another man.
5. Man with man.
6. Man or Woman with Beast.

From these Laws they justify Abrams marrying his Sister by the same Father, Amrams marrying his Fathers Sister, Jacob marrying two Sisters at the same time, Thamar endeavouring to marry her Husbands brother, as not prohibited, before the Levitical Law, or any other marriage, those before mentioned excepted.

And as to Adams Sons marrying their Sisters by the same Mother, the Law was given in the beginning prohibiting it, but God dispens'd with it until the World was competently peopled, as they receive it.

And it is observed by Mr. Selden, That upon the Tradition of this general Law, St. Paul rebukes the Corinthians for permitting among them such a Fornication, that is, such an Incest as was not named among the Gentiles, That a man should have his Fathers wife. Some Examples of which were in Syria, as in Antiochus and Stratonice. 1 Cor. 5. v. 1.

In this sense it is said, A man is a natural Subject when he is so born, and is bound by the Law of his Allegiance as soon as he is, and that a Prince is that Subjects natural Sovereign, because he is bound to protect him as soon as he can be protected. Of which kind of Law of Nature, much is said in Calvins Case, but confusedly, and without clearness of conception: For these Laws of a mans subjection as soon as he is born, being the immediate means of his preservation and good, cannot but be assented to as soon as it is possible to assent, and in that are called Natural Laws.

Of the Natural Laws, in this sense given to all Mankind by the Deity. from the beginning of time, concerning Marriage and bodily knowledge, See excellent matter in that incomparable Work of Mr. Selden, *De Jure Naturali & Gentium juxta disciplinam Ebraeorum*.

And under this sense of Natural Laws hath he titled that Book, *De Jure Naturali & Gentium juxta disciplinam Ebraeorum*; for so the Jews accounted the Laws, or *Leges Noachidarum*, given in the beginning to all Mankind, Natural Laws, though they were in truth but positive Divine Laws, because with relation to Mankind, there was no time wherein they oblig'd not.

In

## In what sense a man is said to act unnaturally against Civil Laws or Agreement.

There is a fourth way whereby a man is said to act unnaturally, which acting is subsequent to Human Laws and Contracts between man and man, which is, when after Laws made, and Contracts civilly settled, a man shall oblige himself diametrically repugnant, and contrary to his former Obligation. As when

A Subject shall by Oath promise, or otherwise bind himself, to judge or force his King, when by his Obligation to his King, he is bound to obey him, and be judg'd by him.

When a Servant shall command and compel his Master, by whom he ought to be commanded.

To contract marriage with two Husbands, when plenary duty and obedience is to be paid to each; and therefore impossible to be performed to both. So is it with a Servant who contracts his absolute Service to two Masters at the same time; those things are unnatural, as not consisting with the nature of the Obligation a man or woman is under, whereof much hath been already said.

## The Levitical Prohibitions of Marriage are no general Law, but particular to the Israelites.

1. All the Prohibitions of the Levitical Degrees were not coeval with mankind, as some were, viz. Marriage with the Mother, the Soror uterina, the Step-mother.

2. They were not in the restoration of mankind declared to Noah, as a Law for mankind: Both these appear by the marriages of the holy men before mentioned, within many of those Degrees.

3. They were undoubtedly deliver'd by Moses to the Jews, but not to mankind; for Moses neither did, nor could, publish them as the World was then peopled, to mankind. And a Law not published, is no more obligative than a Law only conceal'd in the mind of the Law-giver is obligative.

4. As they were delivered to the Jews only by Moses, they bind other Nations no more than other laws of the Jews do, concerning other Subjects, as the laws of succession and inheriting lands or goods.

5. They must then be made obligative, if at all, to the generality of Christians by the New Testament (but by what medium can that be proved) ?

6. They are not obligative to Christians any where, as to the Jews, which appears by the law of raising seed to the Brother: vid. Canon to that purpose de Divortiiis; And by the marriage of two Sisters successively, but not together.

7. Were they obligative to Christians, as to the Jews, then all Christians would be bound to the same punishment as the Jews were for transgressing them, which was never heard. It remains then that Christians are bound to them upon another account.

Besides, it is manifest in the Fifteenth Chapter of the Acts, that when divers taught, That if the Gentiles would be saved, they must keep the Law of Moses.

It was upon that very Question resolv'd in a Council of the Apostles, It was a yoke, neither they, nor their Fathers, were able to bear.

It seem'd good to the Holy Ghost, and to them, to lay no more burthen on the Gentiles, than to abstain from some necessary things: that is,

1. From things offered to Idols.
2. From things Strangled.
3. From Blood.
4. From Fornication.

Which necessary things, are after clearly expounded by St. Paul to the Corinthians, not to be things unlawful simply, but convenient, to keep a Communion between the Jews and Gentiles, that is, the Old Church and the New.

It is further cleared, That this law was no more (than the other Judicial laws) given to the Gentiles.

For when the Gentiles, which have not the law, do by nature Rom. 2. v. 14. the things contained in the Law.

What is then the preferment of the Jew ? or what is the profit of Circumcision ?



Rom. 3. v. 1, 2. Much every manner of way, chiefly, because unto them were committed the Oracles of God.

There is no colour of Argument, That the Prohibitions in the Eighteenth of Leviticus, were universal laws; but that it is said,

Lev. 18. v. 24. Ye shall not defile your selves in any of these things; for in all these things the Nations are defiled which I cast out before you.

Lev. 18. v. 27. For all these Abominations have the men of the Land done, &c.

How could the Land be defiled? or the men of the Land?

How could they be Abominations, if not prohibited?

To the 24. and 27. Verses of the Eighteenth Chapter of Leviticus, the Answer is, That those words refer to those universal laws of the Leges Noachidarum, wherein Egypt and Canaan were defiled: As Incest with the Mother, Soror uterina, the Fathers wife; and to those horrid offences of lying with man or beast, prohibited to all mankind from the beginning. And if the Levitical Incest were prohibited to the people of Egypt or Canaan, by some extraordinary publication (which is not probable) it follows not therefore they were prohibited to all mankind, the words before referring but to those Nations, or to one of them.

### Concerning universal Obligation to the Levitical Prohibitions in Cases of Matrimony and Incest.

Though it be generally receiv'd by the Christian Churches from the primitive times of Christianity, That all Christians are obliged to observe those Prohibitions, as such which Human Authority cannot dispense with; yet by what Law that Obligation was introduc'd upon the Gentiles, converted to Christianity, is not known with any satisfactory clearness. For,

1. It is evident they are not bound by them, as they were Laws promulged by Moses to the Hebrews, both because a Law deliver'd to a particular man, or men, or to a particular Nation, or Nations, is not universal to mankind, nor binding them under any reason of a Law; for every Precept or Prohibition is but to him or them to whom it is given.

2. There

2. There being many several States, who had their Civil Power and Jurisdiction separate from that of the Jews, the promulgation of a Law by Moses to the Jews, could be no promulgation of it to different Nations, under other Civil Powers; and though the Jews believed Moses a Messenger of God's (and so were bound to what he delivered, as by that office) other Nations, who believed not so of him, were not bound by his Testimony, had he testified to other Nations the same things to be the will of God to them, as he did to the Jews, which he never did, nor could. Nor are other Nations bound to the Decalogue, quatenus published by Moses, for the same reason, but are bound only to what is moral of it.

3. Without a sufficient promulgation of a Law, it obligeth no more than a Law conceiv'd only in the mind of the Law-giver.

4. If Moses his Laws, in cases of Incest, extended to mankind, quatenus reveal'd to the Jews, mankind were equally bound to all other the Mosaic Laws (whereof no alteration had been made upon the coming of the Messiah) which is contrary to the persuasion and practise of all the Gentile Nations converted to Christianity at the beginning of it, and ever since.

5. It is likewise contrary to the determination of the Holy Ghost, and the Apostles, at the great and first Council of Antioch, mentioned in the Fifteenth of the Acts, where the Gentiles were directed to observe but four Particulars of the Mosaic Law, as necessary for them, but upon what reason more necessary than the rest observed by the Christian Jews, is not clear.

6. It is true, That by some of our Statutes many of the Levitical Prohibitions are affirmed to be Gods Law, obligative to us, yet the Particulars are not therein named the Levitical Prohibitions, or to be according to the Mosaic Law; and many Levitical Prohibitions are omitted in the enumeration of the marriages against Gods Law, made by those Statutes.

And though such declaration of them to be by Divine Law, be concluding, as to any gain-saying of ours, yet, as to others not subject to the same Authority with us, such declaration may not only be of no authority, but may be accounted senseless and absurd.

I shall therefore endeavour to shew in what notion some of those Prohibitions may be obligative, as universal positive Law, and some obliging as moral Laws, and so universal and of Divine Obligation; the residue obliging not, quatenus delivered to the Jews, but as the same Laws delivered to them, are made universal by a new Obligation.

1. And first, All those Prohibitions mentioned in the Eighteenth of Leviticus, were positive Laws of God to them, quatenus they relate to, and terminate in degrees of Kindred therein specified; and the breach of them punishable by the punishments ordained to that end in the Mosaick Law. And in these respects none of them are binding to any other people than the Hebrews.

2. Divers of those Prohibitions are likewise of moral prohibition, and in that sense binding all men, as in the descending and ascending Line of Generation.

As the Father is prohibited to marry his Daughter, his Sons daughter, and his Daughters daughter, and further, the Levitical Prohibition for nearness of Kin, and for the respects before, extends not.

But the Father is likewise morally (and universally therefore) prohibited, not only those persons, but all others descended from them interminately, that is, as far as may be known.

So in the Ascending Line, the Son is prohibited his Mother and Grand-mother, and no further, by the Mosaick Law; but morally not only them, but all other his great Grand-mothers interminately, as far as may be known; and so, as well as the Son, are all Males descended lineally from him. The reason of this Moral Obligation is well given by the Learned Grotius, in these words;

Grot. de Jure  
belli, l. 2. c. 5.  
Sect. 12. para. 2.

Ab hac generalitate eximo matrimonia parentum cujuscunque gradus cum liberis quæ quo minus illicita sint ratio nî fallor satis apparet, nam nec maritus qui superior est lege matrimonii, eam reverentiam præstare potest matri quam natura exigit, nec patri filia, quia quanquam inferior est in matrimonio, ipsum tamen matrimonium talem inducit societatem, quæ illius necessitudinis reverentiam excludat, &c. And again,

Grot. de Jure  
belli, l. 2. c. 5.  
Sect. 13. para. 3.

Ut de parentibus & liberis nihil jam dicam, quippe quos, ut eximo, etiam sine expressa lege, ratio naturalis jungi satis vetat.

By the same reason, by the Moral Law the Father or Mother cannot be Servants to their Sons or Daughters; for as Father or Mothers, honour is due to them from those they serve; but as Servant, honour is due from them to those they serve, that is; their Children, who are their Masters and Superiors. As Parents, their Children, whom they serve, ought to obey and reverence them. As Servants, they are to obey their Children, who are their Masters and Superiors, and to reverence them. So as this office and relation is inconsistent and repugnant between Parents and Children, and unnatural, therefore morally unlawful.

3. There are other of the Levitical Prohibitions, that by the constant tradition of the Jews were delivered to mankind in the beginning, and which they term *praecepta Noachidarum*, to which they conceiv'd all the sons of Adam obliged; and these Precepts seem warranted by several places of Holy Scripture. These are,

That a man is prohibited his Mother; his Fathers wife, his Sister by the same venter, positively from the beginning; but a dispensation was, as to the Sisters, until a competent peopling of the world; they add the prohibition of another mans wife, which is also Moral, as that of the Mother is.

4. Now the rest of the Levitical Prohibitions, in the matter of marriage, came to be so generally receiv'd by Christians, as being authorized and prescribed by God, seems to have no foundation so warrantable as that Council of the Apostles in the Fifteenth of the Acts.

Where the Gentiles are directed to observe, as necessary only, four particulars of Moses his Law, among which they are required to abstain from Fornication, which if it had been rendred from the Septuagint, from Incest or Turpitude of Copulation, which answered the Original best; it had much facilitated the solution of this Inquiry.

For it hath no colour, That Fornication there should signifie the same with *Stuprum* and *Scortum*, and that it should be abstained from, as a special particular of the Law of Moses, being an Offence, not only prohibited by him (yet not at all among the Prohibitions in the Eighteenth of Leviticus) but by all the Nations of the Gentiles respectively, as well as by Moses. And it is plain, the word *porneia* there rendred Fornication, most frequently signifies in the Septuagint, both Adultery and Incest; and indeed any unlawful Copulation of man and woman.

The



The ends and reasons of this general Law to Christians, might be, First,

1. If the State of the Jews (as many particular men of that State did) had embraced Christianity, yet the Law of Moses had still been obliging to them, as to their Civil Government, as far as it could consist with Christianity, and had been an eternal Law, not to be abrogated but by God himself, who was the Law-giver. Therefore if the Gentiles observed not such of their Laws which preserved their Communion with the Gentiles from being odious and abominated by them. The Gentiles and the Jews, though both had embraced Christianity, must never have had Communion; the Jews being bound by God still to observe Moses's Law.

2. This detestation among them could not sort with the Precepts of Christianity, newly received by both.

3. Worrying at what remoteness of Kindred they thought fit, was in the power of the Gentiles for the future, at their own election, without transgressing their local and native Laws: And therefore induc'd no inconvenience to observe that Precept.

4. Since all Nations of the Gentiles had some restraint of marriages by humane prudence, the Apostles conceived these dictated to the Jews, to be the most convenient restraints to be voluntarily practised among Christians.

5. Other the restraints directed by that Council, all which concerned Meats, which were necessary Mediums to make Communion between men, are prohibited upon the same ground, though in themselves indifferent, and of no obligation, if not made use of in a Jew's presence, who was bound from them. But Incest being a lasting offence and scandal to the Jews, could not be concealed from them, as the eating of Meats might, and therefore was to be abstained from, with resolution to continue it, or not at all.

The three other Precepts by that Council, by Authority of the Holy Ghost, as the words import, It hath seemed good to the Holy Ghost, and to us, are only concerning Meats, that is, First, of things offered to Idols; Secondly, of Blood; And thirdly, of things strangled; without abstinence from which, no Communion could be between the converted Jews and Gentiles. For,

1. Generally, in all Nations, eating together is the most signal instance and proof of Fellowship and Communion; and if the meat prepared be desirable by some, and odious to others of the Company, the fellowship must break.

2. Among the Primitive Christians, at their Sacramental Communion, which was essential to the Christian Religion, they had their Agape, or Love Feasts, wherein, if the Food <sup>2 Cor.</sup> were such as the Christian Gentiles approv'd, and was abominable to the Christian Jews, a dissolution of the Communion between them must necessarily follow, and consequently the Precepts of Christianity be frustrated, both as to form and Christian kindness.

And this Fractiō must have continued as long as the Hebrews Common-wealth lasted, which might have been perpetual; but by the dissolution of that State and Government, their Laws likewise vanished, which were peculiar to that Nation, as it will fall out in the Cases of all States, when dissolved.

If the State of England, France, or Spain, or of any other Nation, be dissolved, their respective Laws end with their dissolution; nor is it, as to this purpose, material, whether the Laws of a Nation proceed from Divine Dictates and Authority, or Humane.

For the State being dissolved, there is no lawful Coercion left for keeping, nor punishment for violating the Laws; and where that is not, there is no Law common to that people: For without coercion and punishment, every man is free, that is, he is not bound to any Law of Community, at least. But perhaps Laws may be to particular men, as to Abraham to sacrifice his Son, to which he was bound, under the displeasure of the Numen.

And thus, by the dissolution of the Hebrew Common-wealth, the Gentiles were freed from those Obligations touching Meats, because the Jews were so too. The observation of them being, after the dissolution of the State, but the pleasure of a particular person or persons, and more than in order to preserve Communion between the people of the Jews and Gentiles, those particular Precepts were of no sanctity to oblige universally, more than any other the Mosaiical Institutions.

2. As before the dissolution of the Hebrew Common-wealth, it was against Christian Charity and Love, to give scandal and offence to an Hebrew, by eating Meat detestable to him, because God had bound him from it; and the Christian Gentile might, without offending any Law, abstain from the Meat, and decline giving scandal.

So after the dissolution of the Israelitish State, when the Jew was equally free as the Christian Gentile, it grew a scandal to the Gentile, That the Jew should abhor or despise Meats which God had made lawful to the Gentile.

It hath been observed by learned men, That it may be collected from the last part of the Eighteenth Chapter of Leviticus, that there was some universal preceding Law given, to abstain from those Carnal Mixtures forbid by Moses.

Defile not your selves in any of these things, for in all these the Nations are defiled which I cast out before you, verse 24. And many of the subsequent Verses are to the same purpose. And these things are called Abominations.

Whence it is infer'd, The people could not be faulty of transgressing, had there not been a Law, for without Law there can be no transgression.

But many Answers may be given to this, as First,

1. From the Eighteenth of Leviticus no pretence can be of an universal Prohibition of Carnal knowledge in all the Degrees there specified, though such Prohibitions might be to the particular Nations mentioned in Leviticus and Deuteronomy, to be therein defiled; but that is most improbable too.

2. The defiling there mentioned may be intended of Sodomy, Buggery, Incest with the Mother, the Fathers wife, the Soror uterina, Adultery, agreed by the Jews to be universally prohibited, which they term Leges Noachidarum, and which are the Offences last mentioned in the Eighteenth of Leviticus before, vers. 24. before cited,

3. The

3. The marriages of many persons eminently in Gods favour, before the Mosaical Law, as Abrahams marrying Sarah his Sister by the Father; Jacob's marrying two Sisters; Amram's, Moses his Father, marrying Jochebed his Fathers Sister; Marrying the Brothers wife, as in the Story of Onan before the Mosaical Prohibitions; Nachor's, Abrahams Brother, marrying Milcah his Brother Harams daughter; and the strong Opinion that Judah himself married Thamar his Daughter in law, as well as he had Coition with her, &c. permits not to believe many Copulations mentioned in Moses his Prohibitions, to have been before universally prohibited.

4. If among the Nations cast out before the Jews, as defiled in these things, Humane Laws had been made among them, as in every Nation of the Gentiles was usual to prohibit some marriages for nearness of Cognation; and those Nations had not observed, but transgressed their own Laws, as is usual in all places, to offend against their known Laws, God might therefore punish them, as daily he doth, and did always the Gentiles for not keeping their own Laws, vid. Paul to the Romans per totam Epistolam.

5. Though men cannot justly make people suffer, but for transgressing Laws which they might have kept; yet the Numen, who is just when he exerciseth absolute Dominion over his Creatures, may inflict sufferings upon a Nation for doing things he likes not, and therefore call such things abominable; as there is an Ill which begets the making of Laws to obviate and prevent it, as well as an Ill in transgressing Laws when they are made. And he which doth contrary to natural prudence, and his own persuasion of what is best, may incur the displeasure of the Numen, as well as for transgressing a Rule or Law which he might have kept. And though this way of punishing is not proper to men, it is as proper, as the other to the Deity, to whom mans thoughts, purposes, ends, and means, are open.

That the abstaining from Incestuous marriages, according to Moses his Law, was a part of the Mosaical Law, precepted to be observed by the Gentiles at that Council, I think can be little doubted, and not the abstaining from what is accounted simple Fornication, which even by Moses his Law was often satisfied by marriage of the woman, and often by money.



But it seems difficult, How that Precept, of the observance of it, could either cause, or preserve Communion between the Jews and the Gentiles, as those others did concerning abstinence from Meats prohibited to the Jews, and not to the Gentiles.

For first, Alliance and Affinity between the Jews and the Gentiles, before, and by the Law of Moses, was absolutely forbidden, though the Gentiles (as many of them did for many prohibited marriages) had abstained by their own peculiar Laws from all those marriages prohibited the Jews. Therefore their Communion by Alliance or Affinity had received no advancement by abstaining from Mosaical Incests in that respect.

But besides the general Interdict of Alliance with the Gentiles, the Jews were interdicted in a special manner, any alliance or conversation with the Nations, whose Land they were to enjoy and inherit, and who were cast out before them, as being defiled in all those Copulations of Kindred, prohibited the Jews, as appears from Verse the Four and twentieth to the end of the Eighteenth Chapter of Leviticus, and which Iniquity was distasteful by making the Land vomit out the Inhabitants.

Lev. 18. v. 24,  
&c.

2. Verse the Thirtieth, the Jews are charged not to commit any one of those abominable Customs committed before them; and if they did, they were punished by death, as appears Leviticus the Twentieth. This was enough to cause a particular detestation and abhorrency in the Jews, of such who accustomed themselves to such marriages, or any of them, above others, of the Gentiles.

Deut. 7. v. 1.

3. The Nations cast out of their Land for committing those things, appear to be Seven; The Hittite, the Girgashite, the Amorite, the Canaanite, the Perizzite, the Hivite, and the Jebusite, whose names they were commanded to destroy from under Heaven, Verse the Four and twentieth of that Chapter; accordingly it appears they did so. Deuteronomy the Second and Third Chapters, The Amorite, and those under Og, King of Bashan, were, Canaan, Moab, and Amalek, destroyed.

Chapter the Seventh, Verse second and third, no Covenant was to be made with, nor marriage between them.

Of the Cities of these people which the Lord thy God giveth thee for an inheritance, Thou shalt save alive nothing that breatheth, but thou shalt utterly destroy them, which shews their destruction was not for transgressing a Law given them by God, as their Law maker, for they were destroy'd which had not offended against the Law, as well as they which had. But it was an Act of Gods absolute dominion over his Creatures, as the Potter may do what he listeth with his Clay, which must not say why hast thou made me thus. Deut. 20.

Whereas they had differing commands concerning Cities far from them; As, 1. To offer them peace; 2. If they accepted it, to make them Tributaries; 3. If they refused it, to kill the Males with the Sword, but to spare the women and children, Deut. 20. from verse 10. to vers. the Fifteenth.

It is hence not improbable the Jews had great averfiness to the Communion of such, whose mixtures in marriage were alike to these Nations, though they were not of these Nations; for the vengeance ordained against them appears not to be for other causes (than for those incestuous Copulations) which were not common to all other the Nations of the Gentiles, as well as to them, that is Idolatry: And for this reason

The Apostles might direct the Gentiles to abstain from marriages that would render them odious to the Jews, and which the Christians ever after continued as most conformant to Gods will in the fitness of marriage.

But this is not reason enough to make all these marriages to be prohibited to the Gentiles absolutely by Divine Institution, as unholy in themselves, without relation to the communion with the Jews, so as to make it absolutely unlawful to change them by any Humane Law upon any occasion. But it is never prudent to change a Law which cannot be better'd in the subject matter of the Law.

Accordingly if we examine well, perhaps dispensations will be found given by the Christian Churches for marriages, within most of those Mosaiical Degrees, and particularly in those marriages instanc'd in which were lawful before the Law of Moses, and which have not a moral inconsistency with them, and so a natural iniquity, and which therefore are prohibited among all civiliz'd Nations, whether ancient or modern, as well as among the Jews, for the most part.

Selden de Ju-  
re Gentium.

In some places some particular examples may be to the contrary, for special reasons of Revelation or Prophecy belied'd, as the Mother to marry the Son.

Accordingly it is affirmed by the Statutes of 28 H. 8. c. 7. & 25 H. 8. c. 22. That the marriages enumerated in both those Acts to be prohibited by Gods Law, were notwithstanding allow'd by colour of Dispensations by mans power. The words of the Statute of 28. are, after the recital of the prohibited marriages, All which marriages, albeit they be plainly prohibited and detested by the Laws of God, yet nevertheless, at some times, they have proceeded under colours of Dispensations by mans power, which is but usurped, and of right ought not to be granted, admitted, nor allow'd.

The same words are in the Statute of 25. but instead of, All which marriages, the words are, Which marriages, &c.

The second Question, What are the Levitical Degrees, I omit, because the marriage in question is in no sort in the Degrees.

Observation.

And by the way it is very observable, That as we take the Degrees of Marriage, prohibited by Gods Law, to be the Levitical Degrees expressed, or necessarily implied in the Eighteenth of Leviticus, upon parity of reason, or by Argument, a fortiori.

So there are some in Leviticus, which by the Act of 28 H. 8. cap. 7. and otherwise in our enumeration of the Levitical Degrees, we admit as absolutely prohibited, which in the Levitical Law, and in the meaning of the Eighteenth of Leviticus, were not absolutely, but circumstantially prohibited; that is,

1. The marriage of a man with his Brothers wife, which by 28 H. 8. cap. 7. is absolutely prohibited, and commonly receiv'd to be absolutely prohibited by the Levitical Degrees.

But was not so by the Levitical Law, nor by the meaning of the Eighteenth Chapter of Leviticus, but when the dead brother left Issue by his wife.

But if he did not, the surviving Brother was, by the Law, to marry his wife, and raise Issue to his Brother.

This

This Law was ſo known, that by all the Evangelists, a Woman, who had Seven Brothers ſucceſſively, our Saviour was asked, *Whoſe Wiſe ſhe ſhould be at the Reſurrexion?*

2. The ſecond of this kind is, A man is prohibited by 28 H. 8. and by the receiv'd Interpretation of the Levitical Degrees, abſolutely to marry his *Wiſes* ſiſter: but within the meaning of Leviticus, and the conſtant praſiſe of the Commonwealth of the Jews, a man was prohibited not to marry his *Wiſes* Siſter only during her life, after he might. So the Text is.

Thou ſhalt not take a Wiſe with her Siſter, during her life, to vex her, by uncovering her ſhame upon her.

This perhaps is a knot not eaſily untied, how the Levitical Degrees are Gods Law in this Kingdome, but not as they were in the Commonwealth of Iſrael, where firſt given.

### Third Queſtion.

The third Queſtion, and chiefly concerning the Caſe in queſtion, is, *Whether* Harrison's marriage with his great Uncle (that is, his Grand-fathers Brothers wiſe) be a marriage by good and ſound deduction of Conſequence within the Levitical Degrees not particularly expreſſed? For, I think it evident, it is not among thoſe that are expreſſed, neither in the Greek nor Latin Tranſlations, nor in the Britiſh names of Kindred, where my Fathers Coſen German hath the appellation of my Uncle; nor holpen by the gloſs of being prohibited in the Twentieth of Leviticus, though not in the Eighteenth.

1. The word Uncle is an equivocal expreſſion, and in ſeveral places ſignifies ſeveral Relations; as in the Britiſh, the Father of Grand-fathers Coſen German is accounted an Uncle to the Son.

2. The Fathers Brother hath in Latin a ſpecific term of Relation to the Son or Daughter, viz. *Patruus*. So hath the Mothers brother, *Avunculus*; but in the Greek it hath not, and is expreſſed only by the word Kinsman.

But the Stat. of 28 H. 8. c. 7. requires this prohibition to be, To marry his Uncles Wiſe.

3. In



3. In Junius and Tremellius's Translation, done with regard to the Septuagint and the Original, the Twentieth of Leviticus, verse the twentieth, is rendred *Quisquis cubaverit cum Amita sua nuditatem patris sui retexit*, where expressly, instead of, and uncovered his Uncles shame, it is uncover'd his Uncle, his Fathers Brothers shame, which makes it the same with the Eighteenth of Leviticus, verse the fourteenth.

I shall therefore first agree, That marriage with the Grand-mother, Great-grand-mother, and with the Great-grand-father, and so upwards, without limit; is, though not expressed, equally prohibited in Leviticus, as marriage with the Father, Mother, or Grand-father, to the Son or Daughter: So as in the right Ascending Line of Generation there can be no lawful marriage.

1. The Father and Mother are the immediate natural Causes of the being of their Childzen, and the Grand-father and Grand-mother are natural mediate causes of their being, and so upwards, in the right ascending Line interminately; for a man could no more be what he is, without his Grand-father and Grand-mother, and so upwards, than without his Father or Mother: Therefore they are really Parents, and necessary mediate causes of bringing the Childzen to have being, and consequently what is due of reverence or acknowledgment for his being, from the Child to Father or Mother, is likewise due to those other Relations in the Ascending right Line.

But the Uncle, quatenus Uncle, &c. doth no more contribute to the natural being of the Nephew or Niece, than as if he had not at all been.

The marriage of the Son or Daughter with Grand-mother or Grand-father, and so with any Ancestor, Male or Female, in the right Ascending Line, is, after Laws determining the knowledge and reverence due to Parents, unnatural and repugnant in it self.

For there is unnaturalness in Civil things, when constituted, sometimes;

Though there be no Master or Servant originally in nature, but only parity, yet after Laws have constituted those Relations,

A. cannot at the same time be both Master and Servant to B. there is a repugnancy in the nature of those two Offices, to be consistent in the same persons at once.

A Father or Mother cannot be Servant to their Son or Daughter; for under the relation of Father or Mother, the Son is to obey them, but in that of Servant, they to obey him, which is repugnant, and against the nature of those Relations.

Under the Law it was not forbidden a man to Curse his Servant, but Death to Curse his Father or Mother. A man might correct and chastise his Servant qua such, but penal alike to chastise his Father or Mother in this sense.

The marriage of the Son with his Mother, or the Daughter with her Father, are unnatural.

For as a Husband to her, the Son is both to command and correct the Mother as his wife, but as a Son, to be commanded, and endure her Correction as Mother.

So between the Father and Daughter, there is a Reverence from the Daughter to the Father, inconsistent with the parity between man and wife; and Laws give often a power over the daughter, which they forbid over the wife.

And the reverence and obedience from the Grand-child to the Grand-mother, in what degree soever, is the same as to the Mother, and the same consequences follow.

For if the Mother or Father have power absolute, or in tantum, over the Son or Daughter, to create reverence to them; the same hath the Grand-mother, or Grand-father, and so forwards.

For if B. the Father have absolute or qualified power over A. the Son, and C. the Grand-father hath the same over B. the Father, then hath C. the Grand-father the same over A. the Son, not immediately but mediately by the Father.

To this purpose the Case put in Platt's Case in the Com. is most opposite. A woman Guardian of the Fleet marries her Prisoner in Execution, he is immediately out of Execution, for the Husband cannot be Prisoner to his Wife, it being repugnant, that he, as Jaylor, should have the Custody of him, and he, as Husband, the Custody of her.

To this purpose also, it is remarkable what that great Scholar and Lawyer, Hugo Grotius hath; Eximo ab hac generalitate matrimonium parentum cujuscunque gradus cum liberis quæ quominus licita sint ratio, ni fallor, satis apparet. Nam nec maritus qui superior est lege matrimonii eam reverentiam præstare potest matri quam natura exigit, nec patri filia, quia quanquam inferior est in matrimonio; ipsum tamen matrimonium talem inducit societatem, quæ illius necessitudinis reverentiam excludat.

Grot. de Jure  
belli, l. a. c. 5.  
Paragr. 12.

But

But as to other Relations, the same Author, in the same place,

De Conjugiis eorum qui sanguine aut affinitate junguntur satis gravis est quaestio, & non raro magnis motibus agitata; Nam causas certas, ac naturales cur talia conjugia, ita ut legibus aut moribus vetantur illicita sint assignare qui voluerit, experiendo discet quam id sit difficile, imo praestari non possit.

I add only, That as the mutual Duties of Parents and Children consist not with their marrying one another; so the Procreations between them will have a necessary and monstrous Inconsistence of Relation.

For the Son or Daughter, born of the Mother, and begot by the Son, as born of the mother, will be a Brother or Sister to the Father, but as begot by him, will be a Son or Daughter.

So the Issue procreate upon the Grand-mother, as born of the Grand-mother, will be Uncles or Aunts to the Father, as begot by the Son, they will be Sons or Daughters to him, and this in the first degrees of Kindred.

Besides, by the Laws of England Children inherit their Ancestors without limit in the right ascending Line, and are not inherited by them. But in the Collateral Lines of Uncle and Nephew, the Uncle as well inherits the Nephew, as the Nephew the Uncle.

In the Civil Law the Agnati, viz. the Father, or Grand-fathers Brother, are loco parentum; and the Canons borrow it thence, but that is because they were Legitimi Tutores, or Guardians by Law to their Nephews; with us the Lord, of whom the Land is held, is Guardian, or the next of Kin to whom the Land cannot descend, and by the same reason they should be loco parentum.

In a Synod or Convocation holden in London, in the year 1603. of the Province of Canterbury, by the Kings Writ, and with Licence under the Great Seal to consent and agree of such Canons and Constitutions Ecclesiastick as they should think fit.

Several Canons were concluded, and after ratified under the Great Seal, as they ought to be; among which the Ninety ninth Canon is this:

No person shall marry within the Degrees prohibited by Gods Law, and expressed in a Table set forth by Authority, in the year of our Lord, 1563. and all marriages so made and contracted, shall be adjudg'd incestuous and unlawful: And the aforesaid Table shall be in every Church publickly set up and fixed, at the charge of the Parish.

Canons 1 Jac.  
 1603. Can. 99.

This Table was first publisht in Arch-bishop Parker's time, in 1563. I know not by what Authority then, and after made a Canon of this Convocation, with the Kings Licence under the Great Seal, and so confirm'd, and since continually set up in Parishes.

By which expressly the Degrees by Gods Law prohibited, are said to be expressed in that Table, and is the same as, No person shall marry within the Degrees prohibited by Gods Law, and which are expressed in the Table. Any other Exposition of the Canon will be forc'd and violent, and the Table set up for the Peoples direction from Incest, but a snare and a deceit to them.

And this marriage is not prohibited in that Table.

There is an Objection, That by the Canon and Civil Law this Degree of Marriage in question is prohibited.

It is true, but by the Statute of 32 H. 8. c. 38. All Prohibitions by the Canon or Civil Law, quatenus Canon or Civil Law, are wholly excluded, and unless the marriage be prohibited by the Divine Law, it is made lawful.

But suppose the Canon or Civil Law were to be taken as a measure in the subject of marriage of what were lawful.

With the Canon Law, of what time would you begin, for it varies as the Laws Civil of any Nation do, in successive Ages. Before the Council of Lateran, it was another Law than since, for marriages before were forbid to the Seventh Degree from Consens Germans inclusively, since to the Fourth.

Every Council varied somewhat in the Canon Law, and every Pope from the former, and often from himself, as every new Act of Parliament varies the Law of England, more or less; and that which always changeth can be no measure of Rectitude, unless confin'd to what was the Law in a certain time, and then no reason will make that a better measure than what was the Law in a certain other time: As the Law of England is not a righter Law of England in one Kings Reign, than in another, yet much differing.



Nerva forbade  
it; Heraclius  
permitted it.  
Grot. Annot.  
167.

So doth the Civil Law, before the marriage of Claudius the Emperour with Agrippina his Brothers daughter, the marriage of the Uncle with his Neece, was not allowed among the Romans. But by a Law of the People and Senate upon that Occasion, such marriages were permitted. Many others of the like kind.

Do not did the Canon Law, and perhaps truly, take more persons to be prohibited within the Levitical Degrees, than are there expressed: What else is the meaning of that place in Levitico vero prohibita fuerunt fere duodecim personae, &c. in the Exposition of the Arbor Consanguinitatis & Affinitatis.

### Reformatio Legum Ecclesiasticarum ex Auctoritate primum Regis *Henrici* 8. inchoata, deinde per Regem *Edwardum* 6. profecta, de gradibus in Matrimonio prohibitis.

Deus in his gradibus certum jus posuit Levitici 18. & 20 Capite, quo Jure nos, & omnem posteritatem nostram teneri necesse est. Nec enim illorum capitum praecepta veteris Israelitarum Reipub. propria fuerunt, ut quidem somniant, sed idem auctoritatis pondus habent quod Religio nostra Decalogo tribuit, ut nulla possit humana potestas quicquam in illis, ullo modo constituere.

Hoc tamen in illis Levitici capitibus diligenter animadvertendum est, minime ibi omnes non legitimas personas nominatim explicari, nam Spiritus Sanctus illas ibi personas evidenter, & expresse posuit ex quibus similia spatia reliquorum graduum, & differentiarum inter se facile posuit conjectari & inveniri. Exempli causa, cum filio non datur uxor mater, Consequens est, ut ne filia quidem patri conjux dari potest, & si patri non licet uxorem in matrimonio habere, nec cum Avunculi conjuge nobis nuptiae concedi possunt.

Admitting this marriage out of the Levitical Degrees,  
whether it be so pleaded as that we ought to deny a  
Consultation,

Faults

## Faults in the Pleading.

The Plaintiff sets forth the Act of 32. and particularly, That all Marriages are thereby lawful, contracted between lawful persons, and that all persons are lawful, not prohibited by Gods Law to marry. Then he sets forth another Clause, That no marriage shall be impeach't (Gods Law excepted) made out of the Levitical Degrees.

Then sets forth his marriage with his Wife, being formerly married to Bartholomew Abbot, his Grand-fathers brother (and consequently his great Uncle) there being no pre-contract of either side which was lawful, *Secundum Jura Divina, & Humana.*

And that he was libell'd for his marriage in the Spiritual Court, as incestuous and unlawful, and sets forth the Articles of the Libel in particular, and the prosecution for a Divorce.

But doth not aberr, That the marriage is without the Levitical Degrees, as he should have done.

Upon which Declaration, the Defendant demurs, and prays a Consultation.

Whereas, if the Plaintiff had aver'd the marriage to be without the Levitical Degrees, the Defendant must either have demurr'd upon that single point, or have been forc'd to have confess'd that it was out of the Levitical Degrees, but was not withstanding against Gods Law, upon the words of the Act, No marriage shall be impeach'd, Gods Law excepted, that is, without the Levitical Degrees.

In such case the Defendant must have shew'd how it was against Gods Law, according to Speccotts C. 5. Rep.

So as by his manner of Pleading, the Court is now to Judge, not whether the marriage be without the Levitical Degrees, but whether it be against Gods Law in general. The Defendant hath not artickled, That Abbot knew the wife carnally; and then it is not a marriage against Gods Law by 28 H. 8. cap. 7. nor that it is within the Levitical Degrees.

And upon this manner of Pleading, after a Prohibition granted, a Consultation was awarded in Mann's Case.

Mann had married his first wifes sisters daughter, and was sued before the High Commissioners; for although this was not prohibited within the Levitical Degrees, yet because degrees more remote are forbidden, they gave sentence of Divorce. And he groundeth his Prohibition upon the Statute of 32 H. 8.

Cr. 33 El. 228.  
Manns Case.

c. 38. And a Conſultation was prayed and granted, becauſe the Prohibition is not to be, if it be not without the Levitical Degrees, and here it was general, and therefore not good.

Mann's Caſe.  
Moore f. 907.  
2.

The ſame Caſe is in Moore, who Reports the Grant of a Prohibition in the Caſe, but mentions not the Conſultation which was moved ſo long after the Prohibition; and therefore alters nothing of Crook's Report. But the Record of this Caſe cannot be found.

Cok. Litt. f.  
235.2.

There is another Caſe of one Richard Pearſon, not Parſons, wherein a Prohibition was granted out of this Court in the like caſe as Manns, ſo marrying his wives ſiſters daughter, in Trinity Term 2 Jac. Rot. 1032.

Sir Edward Coke ſaith, he was drawn into queſtion in the Eccleſiaſtical Court ſo the Marriage, alledging the ſame to be againſt the Canons.

And that it was reſolved by the Court of Common Pleas, upon Conſideration of the Statute of 32 H. 8. cap. 38. that the Marriage was not to be impeach'd, becauſe declared by the ſaid Act to be good, in as much as it was not prohibited by the Levitical Degrees. This Caſe is again remembered by Sir Edward Coke in his Comment upon this Statute of 32 H. 8. in the latter Editions of his Littleton it is not printed, but it ſeems omitted, not by his conſent, becauſe he remembers it in his Magna Charta upon that Statute, long after printed.

But I find there was a Conſultation granted in Hillary Term after the Prohibition granted, but find no appearance of Plea of the Defendant.

But by the Record of that Caſe, the Plaintiff declares, Qui quidem Richardus & Anna fuerunt, & ſunt legales perſonæ inſimul maritari per legem Dei minime prohibitz ac extra leges Leviticales.

Quidam tamen machinans matrimonium prædictum ſecundum legem Dei & Hominum legitime celebratum diſſolvere, Prætendens matrimonium illud fore inceſtuoſum eoſdem Henricum & Annam, &c. in placitum trahi procuravit.

Then ſets forth the Articles of the Libel, whereof 1. is,

Item quod præmiſſorum ratione præfat. Anna fuit ac eſt Affinis tui præfati Richardi, & in gradu de Jure prohibito pro aliquo matrimonio inter te, & eandem contrahendo aut habendo notorie

rie constituta, videlicet filia naturalis, & legitima de Johanne Gardiner, alias Lucas, sorore dictæ Janæ Gardiner, alias Pearson, uxore sua prædictâ.

Now is it material that he saith after, Ac licet prædict. Richardus & Anna Matrimonium prædictum fore legitimum, & per leges Leviticales minime prohibitum, & per Stat. prædict. fore bonum coram præfato Judice placitaverunt & allegaverunt, & illa inevitabili veritate probari, prædictus tamen Judex placitum illud, & allegationem admittere penitus recusavit.

For that is not an Averment, That the Marriage was out of the Levitical Degrees to the Temporal Judges; for they can take no Issue, nor try what Plea was before the Spiritual Judge.

Then upon this pleading, it no way appears that the Libel was for marrying against the Law of God; and if it were not, then the Spiritual Court had no Cognizance, though it were against the Canons which the Act of 32. had excluded.

Therefore the Prohibition might well be awarded, especially because the Libel was, That the marriage was Incestuous.

Next, a Consultation might be granted, unless cause were shew'd, for it was no otherwise. Because the Suggestion was not, That the marriage was out of the Levitical Degrees, but that the persons married were extra leges Leviticales, which was as if they had said, They were not under the Jewish Commonwealth.

And then a Consultation might be granted upon this Prohibition, as upon that of Mann's Case, because the Plaintiff did not averr the marriage to be extra gradus Leviticus, and ground his Prohibition thereupon.

As those two Prohibitions were for marrying the Wives Sisters daughter, that is, the Wives Niece by the Sister. So there is a Case in the Lord Hobbard, where one Keppington married his Wives Sisters daughter, was questioned for Incest by the High Commissioners, and sentenced, and entred into Bond to abstain from her Company, but was not divorced, and therefore the Wife recover'd a Wives Widows Estate in a Copy-hold, notwithstanding the Sentence; but no Prohibition was in the Case.

Hobbard f.  
 181. a.  
 Keppington.

The



The same Case is in the Reports which pass for Mr. Noye's, f. 29. but mistaken, for there in place of his Wives sister, it is Fathers sister.

Hill. 21. Car. II. This Case was, by the King's Command, adjourn'd for the Opinion of all the Judges of *England*, Trin. 22. Car. II. The Chief Justice delivered their Opinions, and accordingly Judgment was given, That a Prohibition ought to go to the Spiritual Court for the Plaintiff.

*Mich.*

*Mich. 20 Car. II. C. B.*

*Sir Henry North Plaintiff, William Coe Defendant.*

**S**IR Henry North hath brought an Action of Trespafs, Quare clausum fregit, against William Coe, in a Close upon the new Assignment, called Westrow-hills, containing Fifty Acres, a Close called the Heyland, containing One hundred Acres, and another called the Delf and Brink, containing One hundred and fifty Acres in Mildenhall.

The Defendant pleads, That the said places are part of the Mannor of Mildenhall, whereof the Plaintiff was seisd, tempore transgressionis suppositæ, and that he was then, and yet is seisd of an ancient Messuage, with the Appurtenances in Mildenhall, being one of the free Tenements of the said Mannor, and held of the said Mannor, by Rents and other Services, in his demesne as of Fee.

That there are divers freehold Tenements, time out of mind, in the said Mannor, held by several Rents and Services, parcel of the said Mannor, and that there were, and are, infra eandem Villam, divers customary Tenements, parcel of the said Mannor, grantable Ad voluntatem Domini, by Copy.

That all the Tenants of the free Tenements, time out of mind, habuerunt, & usi fuerunt, and all the Tenants of the Customary Tenements, Per consuetudinem ejusdem Manerii in eodem Manerio, à toto tempore supradicti. usitat. & approbat. habuerunt & habere consueverunt solam & separalem Pasturam prædicti. Clausi vocat. *Westrow-hills*, cum pertinent. for all their Cattel (Hogs, Sheep, and Northern Steers except) levant and couchant upon their respective Messuages and Tenements every year, for all times of the year, except from the Feast of St. *Edmund* to the Five and twentieth of *March* next following, as belonging and pertaining to their several Tenements.

And

And likewise had, and used to have, solam & separalem Pasturam prædict. Clausi vocat. *Westrow-hills*, from the Feast of St. *Edmund* every year, to the Five and twentieth of *March*, for seeding of all their Cattel (Hogs, Sheep, and Northern Steers except) levant and couchant, &c. Excepted that the Tenants of the Demesne of the Mannor every year, from the said Feast to the Five and twentieth of *March*, by custome of the said Mannor depastured their Sheep there.

That at the time of the Trespals, the Defendant put in his own Cattel, levant and couchant, upon his said Messuage, prout ei bene licuit, and averreth not that none of his said Cattel were, Porci, Oves, or Juvenci, called Northern Steers, but Petit Judicium.

The like Plea he makes for the Closes called the Haylands Delf and Brink, but that the free Tenants, as before, and customary Tenants, had solam & separalem Pasturam pro omnibus averiis (Porcis, Ovibus, & Juvencis, called Northern Steers, excepted) for all times of the year.

And that he put in Averia sua, levantia & cubantia, super tenementum prædictum prout ei bene licuit, & Petit Judicium.

Cum hoc quod verificare vult quod nullus bovium prædict. ipsius Willielmi fuerunt Juvenci, vocat. *Northern Steers*.

Whereas no mention is of putting in Oxen, but Averia sua in general, and no averment that no Sheep were put in.

The Plaintiff demurs upon this Plea.

## Exceptions to the Pleading.

The Defendant saith he was seisd de uno antiquo Messuagio, being one of the freehold Tenements of the said Mannor, and that there are divers freehold Tenements within the said Mannor, and that omnes Tenentes of the said Tenements, have had solam & separalem pasturam for all their Cattel, levant and couchant, except Porcis, Ovibus, and Juvencis, called Northern Steers, in the place called *Westrow-hills*, and that he put his Cattel, levant and couchant, prout ei bene licuit.

1. That

1. That he was seisd, de uno antiquo Messuagio, and of no Land, is not proper; for Cattel cannot be levant in common intention, upon a Messuage only.

2. He saith he put in his Cattel levant and couchant, but avers not as he ought, That none of them were Porci, Oves, or Northern Steers; for Porci there is a Rule of Court.

3. He pleads in like manner as to the Hayland Delf and Brink, That he put in his Cattel, and avers that non Bovium prædict. were Northern Steers; when as there is no mention of putting in Oxen, but Averia generally, and no averment that there were no Sheep.

4. The Plea doth not set forth the Custome of the Mannor, but implicitly that the Free-hold and customary Tenants have had and enjoy'd per consuetudinem Manerii solam & separalem pasturam for all their Cattel, which is a double Plea, both of the custome of the Mannor, and of the claim by reason of the custome, which ought to be severall, and the Court should judge and not the Jury, whether the claim be according to the custome alledg'd.

The custome may be different from the claim per consuetudinem Manerii, if particularly alledg'd.

Lastly, the matter in difference is not before the Court formally by this way of pleading; for the matter in question must be, Whether the Lord of the Mannor be excluded from pasturing with the Tenants in the place in question, or from approving the Common? If the Defendant had distrained Damage feasant, and the Plaintiff brought his Action, and the Defendant avow'd propter solam & separalem pasturam, the Lords right to depasture had come properly in question, and by natural pleading.

Or if the Lord, upon the Tenants plea, had taken no notice of sola & separalis pastura, but had confessed that the Land was a Common, and that he had approv'd the places in question, leaving sufficient Pasture for the Tenants, if then the Tenant had demurr'd upon his Plea of Sola & separalis pastura, the right of approving had properly come in question.

A man hath no right to any thing for which the Law gives no remedy.

This must be a Common or Nothing.



1. If disseis'd, the Assise is Quare disseisivit eum de Communia pasturæ suæ.

If surcharg'd, an Admensuratio pasturæ is Quare Superoneravit Communiam pasturam suam.

22 Aff. p. 48.  
Cok. Litt. 4. b.

Trespas lies not for a Common, but doth for Sola & separalis pastura granted to one or more jointly; But not here, where all cannot joyn in Action, and several Actions would cause several Fines to the King for the same offence, which the Law permits not.

He cannot abate but for Damage done to his Common, not for his Sola & separalis pastura.

Foytson &  
Cratchrod's  
Case, 4. Rep.  
f. 31.

2. No Common or Pasture can be claimed by Custome within the Mannor, that may not be prescribed for out of the Mannor, for what one might grant another might. But no Prescription can be for Sola & separalis pastura out of the Mannor to such Common. Therefore they shall not claim it by Custome in the Mannor.

For Copy-holders must prescribe out of the Mannor that the Lord for himself, and his Tenants at will, hath always had Common in such a place, which Prescription giveth the Lord what this Custome would take from him.

3. No man enjoys a Real profit, convey'd from the Lord, which he cannot re-transfer again to the Lords benefit; but a Commoner of such a Common cannot Release, Surrender, Extinguish, or otherwise Convey this Common to the Lords benefit.

Smith & Gate-  
woods Case.  
3 Jac. Cr. f. 52  
6. Rep. f. 59.  
15 E. 2. Title  
Prescript. pl.  
51.

Which is the reason in Gatewood's Case, That Inhabitants not corporate cannot prescribe in a Common; none of them can extinguish or release that Common he claims.

3 Jac. Cr. f. 52  
6. Rep. f. 59.  
15 E. 2. Title  
Prescript. pl.  
51.

A man prescribed in the sole Pasture, after carrying of the Hay, to a certain time of the year.

Fitz. pl. 55. super.

So tempore E. 1. a Prescription for all the Pasture, and the Owner of the Soil could only plough, sow, and carry his Corn, but not depasture the Grass at all.

But no Case, where different persons had by different Title, as here, in the same ground, Solam & separalem pasturam.

Not no Case where Sola & separalis pastura is granted to a man and his Heirs; which seems the same as granting omne proficuum terræ: For where it is alledged there may be Mines, Woods, and the like, notwithstanding the Grant of Solam & separalem pasturam, these are casual, and not constant profits; they may be, or not be at all.

When

When a man brings an Action, as an Entry for Disseisin, or the like, where he must allege Esplees, the profit of a Mine will not serve, but for the Mine it self, which may be a divided Inheritance from the Soyl.

So may Woodland be a divided Inheritance from the Soyl, and the profit of cutting of that is not Esplees of the Land generally, but of the Woodland, but the profits of all and every part, are the Esplees of the Land, and proves seisin of the whole Land, which are in the form of pleading the Corn, Grass, and Hay, which are profits pour moy & pour tout, and where Sola & separalis pastura is granted generally away, Seisin cannot be alleged in taking any of these.

It is agreed generally for Law, That a Prescription to have Solum & separalem Communiam in certain Land, doth not exclude the Owner of the Soyl to have Pasture or Estovers. Cok. Litt. f. 122. a.

But by that Book a man may prescribe to have Solum vesturam terræ from a certain day, to a certain day in the year, and so to have Solum pasturam terræ. And so are the Books of 15 E. 2. pl. 51. and of E. 1. pl. 55. in Fitz-herbert, Title Prescription, but they go no further, nor determine what Estate he hath who claims Solum & separalem pasturam to him and his Heirs, excluding the Lord wholly from any Pasture, Hay, or Cagn.

In granting or prescribing to have Solum & separalem Communiam, why the Lord is not excluded, is not clear by that Book, or any other. For.

There are two notions or senses of the word Communia, the one, as it signifies that Interest in the Common which one Commoner hath against another, not to have the Common overcharg'd. And is that Interest, to which the Writ De Admensuratione pasturæ relates, which only lies for Commoner against Commoner, and not for a Commoner against the Lord, or for the Lord against a Commoner, as is clear by Fitz-herbert. Fitz. Na. Br. de Admensuratione pasturæ, f. 125. a.

And in this sense there may be Sola & separalis Communia, for only one may have right of Common, and no more, either by Grant or Prescription. So in this sense one part of the Tenants of a Mannor may have the sole right of Commoning in a certain place, excluding the other part of the Tenants, and may claim there Solum & separalem Communiam à cæteris Tenentibus & Mæprij. Foytlan's C. 4. Rep.

The other notion of Communia is, when one or more hath right to Pasture with the Owner of the Soyl; and in this sense it is impossible for a man to have solam & separalem Communiam, for one cannot have that alone which is to be had with another, nor do that alone which is to be done with another.

So as a man may have Solam & separalem Communiam in that sense, that none is to be a Commoner but himself, but not in that sense that none else should depasture the Land but he; for Communia cannot signifie an absolute severall.

As 'tis a Contradiction, that a Common, which is to more than one, can be a severall, and belong but to one.

So it is an equal Contradiction, That what in its nature is to be the right of one only, can be Common, and the right of more than one.

Others cannot have what is only to be had by me, more than I can have only what is to be had by others with me.

Therefore Sola & separalis Pastura may be enjoyed by one, or by many jointly, and by way of Survivor, but not by many by different Titles, as belonging to severall Free-holds, for Sola & separalis pastura can be, but Soli & separatim.

Na.Br.f.231.a.  
l.c. 8 E. 4.  
f.17.Br.grants.  
pl.95.

If the King had a Corody from an Abby of two or three loaves of Bread per diem, and of so many measures of Drink, this might be granted to two or three severall persons. But if he had a Corody of one Meal a day, or Sustentationem unius Vilecti per diem, this could not be granted but to one, because its nature was confin'd to one.

A man cannot have an Assise of Common in his own Soyl, nor an Admensuratio pasturæ, and a Common being a thing that lies in grant, he cannot grant it to himself, and no other can grant it in his Soyl to him.

So as I conclude, one or more may have Solam & separalem Communiam from other Commoners, but not from the Lord, who is no Commoner.

I cannot discern the use of this kind of Prescription for the Tenants; for if it be to hinder the Lord from approving the Common, I think they are mistaken.

The Statute of Merton gives the Owner of the Soyl power to approve Common Grounds appendant, or appurtenant, by Prescription, as this is, if sufficient Pasture be left for the Commoners, without considering whether the Commoners had the Common solely to themselves, excluding the Lord, or otherwise. For as to Approvement (which the Statute provided for) the Lord was equally

Cok.2. Infit.  
f.86. 475.  
West.2. c.46.

equally, bound pasturing with his Tenants, or not pasturing with them. Therefore the Statute consider'd not that, but that the Lord should approve his own ground, so the Commoners had sufficient, whatever the nature of the Common were.

To prescribe to have in such a part of the Lord's Lands Communiam for their Cattel, excludes not the Lord.

To prescribe to have their Pasturam Communem for their Cattel, is the same thing, and excludes not the Lord.

To prescribe to have solam & separalem Communiam, is naught by Admittance.

Why then to prescribe to have solam & separalem Pasturam Communiam, which is agreed to be the same with Communiam, is naught also.

Now, to express another way that they have solam & separalem Pasturam Common to them, or wherein they Common, changeth not the matter in the meaning, but order of the words.

The Statute of Merton is, cap. 4.

1. The Lords could not make their profit de Vastis, Boscis, & Pasturis Communibus, when the Tenants had sufficientem pasturam quantum pertinet ad tenementa sua.

2. Si coram Justiciariis recognitum sit quod tantum pasturæ habeant quantum sufficit, &c.

3. Et quod habeant liberum ingressum & egressum de tenementis suis, usque ad pasturam suam, tunc recedant quiet.

4. And that then the Lords faciant commodum suum de terris vastis & pasturis.

5. Et si per Assisam recognitum fuerit quod non habent sufficientem pasturam.

6. Tunc recuperent Seisinam suam per visum Juratorum, ita quod per Sacramentum eorum habeant sufficientem pasturam.

7. Quod si Recognitum sit quod habeant sufficientem pasturam, &c.

Communibus pasturis is once named, Pastura sua for Communia sua, seven times; and the word Communia not named in this Act, but where it mentions.

8. The Writ of Novel disseisin de Communia pasturæ suæ, which makes eight times.

1. The granting solam & separalem Pasturam of or in Black-acre, may signifie an exclusion only of having Pasture in White-acre, or any other place than Black-acre.

2. The



2. The granting *Solam & separalem pasturam* of *o2* in Black-acre, may signifie the exclusion of any other person to have Pasture in Black-acre, but the Grantor, in which sense the word *Solam* signifies as much as *totam pasturam*.

3. If the Grant be of all the Pasture, the Grantor reserves nothing to himself of that which he grants, but all passes into the Grantee; but if the Grantor reserves the Grant, after general words of granting all the Pasture, the Restriction is for the benefit of the Grantor.

Therefore when the Grant is of *Solam & separalem pasturam* of *o2* in Black-acre, all the Pasture is supposed to pass, without restriction, to the Grantee; but if words follow in the Grant, *pro duabus vaccis tantum, o2 pro averiis levantibus & cubantibus super certum tenementum*, that is a restriction for the benefit of the Grantor; for a man cannot in the same Grant restrain for his own benefit the largeness of his Grant, and yet have no benefit of his restriction.

The Court was divided; The Chief Justice, and Justice Tyrrill for the Plaintiff. Justice Archer and Justice Wyde for the Defendant.

Hill. 20 & 21 Car. II. C. B. Rot. 1552.  
 Adjudgd 23 Car. II. C. B.

*Gardner verſ. Sheldon.*

In *Ejectione Firme* for Lands in *Suffex.* Upon not  
 Guilty pleaded,

**I**T is found by the Special Verdict, that long before the ſup-  
 poſed Trefpaſs and Ejectment,

One William Roſe was ſei'd of the Land in queſtion in his  
 Demefine, as of Fee, and ſo ſei'd, made his laſt Will and Teſta-  
 ment, November the Second, 13 Jac. prout ſequitur, and ſets  
 forth the Will; wherein among other things,

As touching the Leaſe which I have in my Farm, called *Eaſter-  
 gate*, and all my Intereſt therein, I do give and aſſign the ſaid Leaſe,  
 and all my Intereſt therein, unto my Friends *John Clerk*, *George  
 Littlebury*, and *Edward Roſe*, to the intent that, with the Rents  
 and Profits thereof, they may help to pay my Debts, if my other  
 Goods and Chattels ſhall not ſuffice. And after my Debts paid, my  
 will is that the Rents and Profits of the ſaid Land ſhall wholly go  
 for and towards the raiſing of Portions for my two Daughters, *Ma-  
 ry* and *Katherine*, for each of them Six hundred pounds, and for  
 my Daughter *Mary* Two hundred pounds more, which was given  
 her by my Father, her Grand-fathers Will. And thoſe Sums be-  
 ing raiſed, my will is the Rents and Profits of the ſaid Land ſhall  
 be wholly to the uſe and benefit of my Son *George*, &c.

Item, I give to my daughter *Mary* my greateſt Silver Bowl.

Item, I give to my daughter *Katherine* one plain Silver Bowl,  
 &c.

My will and meaning is, That if it happen that my Son *George*,  
*Mary* and *Katherine* my daughters, to die without Iſſue of their  
 Bodies lawfully begotten, then all my Free-lands, which I am now  
 ſei'd of, ſhall come, remain, and be to my ſaid Nephew *William  
 Roſe*, and his Heirs for ever.

*They*

They find that the said William Rose, the Testator, befoze the Trespass, viz. the First of June, 14 Jac. died at Easter-gate, in the said County of Suſsex, seisd as aforesaid.

That at the time of his death, he had Issue of his body lawfully begotten, George Rose his only Son, and Mary and Katherine his two Daughters.

That George, the Son, entred into the Premises the First of July, 14 Jac. and was seisd prout Lex postulat.

Then after, and befoze the time of the Trespass, viz. June the Eight and twentieth, 14 Car. 2. George died so seisd of the Premises at Easter-gate aforesaid.

That at the time of his death he had Issue of his body two Daughters, Judith now wife of Daniel Sheldon, one of the Defendants, and Margaret now wife of Sir Joseph Sheldon, the other Defendant.

That after the death of George their Father, the said Judith and Margaret entred, and were seisd befoze the Trespass suppos'd, prout Lex postulat.

That Mary, one of the daughters of the said William Rose, July the First, 1 Car. 2. died, and that Katherine her Sister survived her, and is still living.

That the said Katherine, October the First, 20 Car. 2. at East-Grimsted, entred into the said Tenements, and was seisd prout Lex postulat, and the same day and year demis'd the same to the said Thomas Gardner, the Plaintiff, from the Feast of St. Michael the Arch-angel then last past, for the term of five years then next following; By virtue whereof the said Thomas Gardner entred, and was possessed, until the said Joseph and Daniel Sheldon, the same First day of October, 20 Car. 2. entred upon him and Ejected him.

If upon the whole matter the Justices shall think the said Joseph and Daniel Sheldon culpable; they find them culpable, and assess Damages to Six pence, and Costs to Twenty shillings. But if the Justices shall conceive them not culpable, they find them not culpable upon the words, My will is, if it happen my Son George, Mary and Katherine my Daughters, do dye without Issue of their Bodies lawfully begotten, then all my Free Lands, which I am now seised of, shall come, remain, and be to my said Nephew William Rose and his Heirs for ever.

The firſt Queſtion is, Whether by this Will any Eſtate be Q. 1.  
devis'd to the Son and Heir of the Teſtator, or to his Siſters?

If any Eſtate be devis'd, what Eſtate is ſo devis'd to them, Q. 2.  
or any of them?

The third Queſtion is, What Eſtate is by this Will devis'd Q. 3.  
to the Nephew; and if any be, how it ſhall take effect, whether  
as a Remainder, or as an Executory deviſe?

1. As to the firſt, it is clear, That no Eſtate is devis'd  
to the Son or Daughters, or any of them by expreſs and ex-  
plicit deviſe; but if any be, it is devis'd by implication only,  
and collection of the Teſtators intent.

2. If any Eſtate be given by this Will by Implication to the  
Son or Daughters, or any of them, it muſt be either a Joynt  
Eſtate to them for their lives, with ſeveral Inheritances in tayl,  
or ſeveral Eſtates tayl to them in Succeſſion, that is to one firſt,  
and the Heirs of his or her body, and then to another, and ſo  
ſucceſſively.

3. Such an Intail in Succeſſion cannot poſſibly be, becauſe it  
appears not by the Will who ſhould firſt take and have ſuch E-  
ſtate, and who next, &c. and therefore ſuch an Intail were meer-  
ly void, for the Incertainty of the perſon firſt taking, as was  
rightly obſerv'd, and aſſented to at the Bar.

It remains then, That the Eſtate devis'd by this Will (if a-  
ny be) to the Son and his two Siſters, muſt be a joynt Eſtate  
for their lives, with ſeveral Inheritances to them in tayl, by  
implication only.

And I am of Opinion, That no ſuch Eſtate is devis'd by this  
Will to the Son and two Daughters; and I ſhall firſt obſerve,  
That the Law doth not, in Conveyances of Eſtates, admit Eſtates  
to paſs by implication regularly, as being a way of paſſing E-  
ſtates not agreeable to the plainneſs requir'd by Law, in trans-  
ferring Eſtates from one to another. And for that the Caſe is,

A man according to the Cuſtome of the Mannor, ſurrendered to  
the uſe of *Francis Reeve*, and of *John*, Son of the ſaid *Francis*, and of  
the longeſt liver of them; and for want of Iſſue of *John* lawfully be-  
gotten, the Remainder to the youngeſt Son of *Mary Seagood*, *John*  
had only an Eſtate for life, and no Eſtate tayl by implication, it be-  
ing by conveyance. Though (as the Book is) it might perhaps  
be an Eſtate tayl by Will; which ſhews, Eſtates by implication  
are not at all favour'd in Law, though in mens laſt Wills they  
are allow'd with due reſtrictions.

Seagood and  
Hones Caſe,  
10 Cal. Cr. ſ.  
336.



In a Will Estates are often given by implication. But I shall take this difference concerning Estates that pass by implication, though it be by Will.

An Estate given by implication of a Will, if it be to the disinheriting of the Heir at Law, is not good, if such implication be only constructive and possible, but not a necessary implication.

I mean by a possible implication, when it may be intended that the Testator did purpose, and had an intention to devise his Land to A. but it may also be as reasonably intended, that he had no such purpose or intention to devise it to A.

But I call that a devise by necessary implication to A. when A. must have the thing devised, or none else can have it.

And therefore if the implication be only possible, and not necessary, the Testator's intent ought not to be construed to disinherit the Heir, in thwarting the Dispose which the Law makes of the Land, leading it to descend, where the intention of the Testator is not apparently, and not ambiguously to the contrary.

Spirt & Ben-  
ces C. 8 Car.  
1. Cro. 368.

To this purpose the Case is 8 Car. 1. where Thomas Cann devised to Henry his youngest Son; Item, I give to the said Henry my Pastures in the South-fields, and also I will that all Bargains, Grants, and Covenants, which I have from Nicholas Welb, my Son Henry shall enjoy, and his Heirs for ever; and for lack of Heirs of his Body, to remain to my Son Francis for ever.

It grew a Question, Whether this were an Intayl to Henry of the South-fields, or only of the Bargains and Grants which the Testator had from Welb, which was a very measuring Case; and in determining this Case

All the Four Judges agreed, That the words of a Will, which shall disinherit the Heir at Common Law, must have a clear and apparent intent, and not be ambiguous, or any way doubtful, (So are the very words of the Book) and therefore they resolved in that Case, That only the Bargains and Grants had from Welb were intayld to the youngest Son, and that he had only an Estate for life in the Pastures in the South-fields.

1. I shall therefore now clear the difference I have taken, That the Heir shall never be disinherited by a devise in a Will by implication, and not explicit, where the implication is only a possible implication, and not a necessary implication.

2. In the second place I shall shew, That the words of this Will do not import a devise to the son and the two daughters for their lives jointly, with respective Inheritances in tail to the Heirs of their several bodies, by any necessary implication, but only by an implication that is possible by construction.

3. In the third place I shall shew, That being so as to the Case in question, it is not material whether the devise by way of Remainder to the Nephew, be void or not.

4. In the fourth place, ex abundante, and to make the Will of the Testator not ineffectual in that part of the Will, I shall shew, That the Nephew hath not the Land devis'd to him, when the son and the two daughters dye without Issue of their respective bodies, by way of Remainder, which cannot be but by way of Executory devise, which well may be.

5. That by such Executory devise no perpetuity is consequent to it; or if it were, such a perpetuity is no way repugnant or contrary to Law.

To manifest the difference taken between an implication in a Will that is necessary, and implication that is only possible, the first Case I shall cite is that known Case 13 H. 7. which I shall exactly put as it is in the Book at large.

13 H. 7. f. 17.  
Br. Devise pl.  
52.

A man devis'd his Goods to his wife, and that after the decease of his wife, his son and heir shall have the House where his Goods are: The son shall not have the House during the wives life; for though it be not expressly devis'd to the wife, yet his intent appears, the son shall not have it during her life; and therefore it is a good devise to the wife for life, by implication, and the Devils intent, Quod omnes Iudicarii concesserunt. Here I observe,

1. That this was a devise of the House to the wife by necessary implication; for it appears by the Will that the Testators son and heir was not to have it until after the death of the wife, and then it must either be devis'd to the wife for life by necessary implication, or none was to have it during the wives life, which could not be.

2. I observe upon this Case, That though the Goods were by particular devise given to the wife, and expressly, that was no hindrance to the wives having the House devis'd to her; also by her husband by implication necessary: which I the rather note, because men of great name have conceiv'd, That where the devisee takes any thing by express devise of the Testator, such devisee shall not have any other thing by that Will devis'd, only by implication.

Which difference, if it were according to Law, it makes clearly against the Plaintiff, because his Lessor being one of the Daughters of the Testator, had devis'd to her expressly for a Portion, and therefore she should not have any Estate in the Land by the same Will, by a Devise by Implication, as is pretended.

But the truth is, that is a vain difference that hath been taken by many, as I shall anon evince, and therefore I shall not insist upon any Aid from it to my conclusion.

I note that this Devise being before the Statute of 32 H. 8. of Wills, the House devis'd must be conceiv'd devisable by Custom at the Common Law.

Before I proceed further, I must take notice that Brook, in abridging the Case of 13 H. 7. in the same numero, saith,

Devise Br. n.  
32.

It was agreed, tempore H. 8. per omnes, That if a man will that J. S. shall have his Land in Dale, after the death of his wife, the wife shall have the House for her life by his apparent intent. I note first, That this Case is imperfectly put in Brook, for it mentions a devise of the Land in Dale to J. S. after the death of his wife, and then concludes that the wife shall have the House for her life by his apparent intent; whereas no mention is made of a House, but of the Land in Dale in the devise. And this Case seems to be only a memory of another Case, not abridg'd by Brook out of any other Year-book, but reported in his Abridgement in the Title Devise, as a Case happened in 29 H. 8. which is,

Br. Devise  
29 H. 8. n. 48.

That if a man will that J. S. shall have his Land after the death of his wife, and dies, the wife of the Devisor shall have those Lands for term of her life by those words, ratione intentionis voluntatis. Which Cases being in truth but one and the same Case, seem to go further than the Case of 13 H. 7. for there, as I observ'd before, the wife was to take by necessary implication, because the Heir was excluded expressly by the Will, during the life of the wife.

But by this Case in Br. Title Devise n. 48. & 52. there is no excluding of the Heir, and yet it is said the wife shall have the Land during her life by implication, which is no necessary implication, as in the Case of 13 H. 7. but only a possible implication, and seems to cross that difference I have taken before.

But

But this Case of Br. hath many times been denied to be Law, and several Judgments have been given against it. I shall give you some of them, to justify the difference I have taken, exactly as I shall press the Cases.

Trinity 3 E. 6. A man leas'd of a Mannor, part in Demesne, and part in Services, devis'd all the demesne Lands expressly to his wife, during her life; and devis'd to her also all the Services and chief Rents for Fifteen years, and then devis'd the whole Mannor to a stranger after the death of his wife.

3 E. 6. Moore's  
Rep. 7. n. 24.

It was resolved by all the Justices, That the last devise should not take effect for any part of the Mannor, but after the wives death; but yet the wife should not have the whole Mannor by implication during her life, but should have only the demesnes for her life, and the Rent and Services for Fifteen years, and that after the Fifteen years ended the Heir should have the Rents and Services as long as the wife liv'd: Here being no necessary Implication that the wife should have all the Mannor during her life, with an exclusion of the Heir; she had no more than was explicitly given her by the Will, viz. the Demesnes for life, and the Rents and Services for Fifteen years; but after the Fifteen years the Heir had the Rents and Services, for it could be no more at most but a possible Implication that the wife should have the whole Mannor, during her life.

But with a small variance of this Case if the demesnes had been devis'd to the wife for life, and the Services and Rents for Fifteen years, and the whole Mannor after the wives life to J. S. and that after the wives life, and the life of J. S. his Heir should have had the Demesnes, and Services, and Rents, in that Case it had been exactly the same with the Case of 13 H. 7. because the Devisors intent had been then apparent that the Son was not to have the Mannor, or any part, until the wife and stranger were both dead, and as it was adjudg'd, the stranger had nothing in the Mannor until the wives death; therefore in that case, by necessary implication, the wife must have had both Demesnes and Services during her life, notwithstanding the explicit devise to her of the Rents and Services for Fifteen years, otherwise none should have had the Rents and Services after the Fifteen years, during the wives life, which was not to be intended.



15 El. Moore  
f. 123. n. 265.

Another Case I shall make use of, is a Case Pasche 15 El. A man seis'd of a Messuage, and of others Lands occupied with it, time out of mind, leased part of it to a stranger for years, and after made his last Will in these words, I will and bequeath to my wife my Messuage, with all the Lands thereto belonging in the occupation of the Lessee, and after the decease of my Wife, I will that it, with all the rest of my Lands, shall remain to my younger Son.

The Question in that Case was, Whether the wife should have the Land not leased by implication for her life, because it was clear, the younger Son was to have no part, until the death of the wife. And the Lord Anderson at first, grounding himself upon that Case in Brook (as it seems) of 29 H. 8. twice by Brook remembered in his Title Devise n. 28. and after n. 52. was of opinion, That the wife should have the Land not leased by implication: But Mead was of a contrary opinion, for that it was expressly devis'd, That the wife should have the Land leas'd; and therefore no more should be intended to be given her, but the Heir should have the Land not in lease, during the wives life. To which Anderson, mutata opinione, agreed. Hence perhaps many have collected, That a person shall not take Land by Implication of a Will, if he takes some other Land expressly by the same Will; but that is no warrantable difference.

For vary this Case but a little, as the former case was varied, That the Land in lease was devis'd to the wife for life, and after the death of the wife, all the Devisors land was devis'd to the youngest Son, as this Case was; and that after the death of the wife, and the youngest son, the Devisors Heir should have the Land both leas'd, and not leas'd: it had been clear that the Heir (exactly according to the Case of 13 H. 7.) should have been excluded from all the Land leas'd, and not leas'd, until after the death of the wife and the younger son. And therefore in such case the wife, by necessary implication, should have had the Land not leas'd, as he had the Land leas'd by express devise, and that notwithstanding she had the leas'd Land by express devise, for else none could have the Land not leas'd during the wives life.

Horton verif.  
Horton.  
2 Jac. Cr. f. 74.  
& 75.

Wadham made a Lease for years, upon condition the Lessee should not alien to any besides his Children. The Lessee devised the term to Humphrey his son, after the death of his wife, and made one Marshall and another his Executors, and died: The Lessor entered, as for breach of the Condition, supposing

posing this a devise to the wife of the term by implication. The opinion of the Judges was, It was no devise by implication, but the Executors should have the term until the wives death, but it was said, If it had been devis'd to his Executors after the death of his wife, there the wife must have it by implication, or none could have had it. But Popham denied that Case, because if the devise had been to the Executors after the wives death; the Executors should, when the wife died, have had the term, as Legatees, but until her death they should have it as Executors generally, which by all opinions fully confirms the difference taken, That a devise shall not be good by implication, when the implication is not necessary; and in this Case all agreed the Case in 13 H. 7. to be good Law, because the implication there was necessary.

Edward Clatch being seisd of two Messuages in Soccage tenure, and having Issue a Son and two Daughters by three several Venters. His Son being dead in his life time, and leaving two Daughters, who were Heirs at Law to the Father, devis'd one of the Messuages to Alice his Daughter, and her Heirs for ever; and the other to Thomazine his Daughter, and her Heirs for ever, with limitation, That if Alice died without Issue, living Thomazine, Thomazine should then have Alice's part, to her and her Heirs; and if Thomazine died before the Age of Sixteen years, Alice should have her part in Fee also. And if both his said Daughters died without Issue of their bodies, then the Daughters of his Son should have the Messuages. The youngest daughter of the Testator died without Issue, having past her Age of sixteen years, It was resolv'd, That the words in the Will, If his two Daughters died without Issue of their Bodies, did not create, by implication, cross remainders in tail to the Devisors Daughters, whereby the eldest should take the part of the youngest, but her part should go to the Heirs at Law, according to the Limitation of the Will; and those words were but a designation of the time when the Heirs at Law should have the Messuages.

Note, That one of the Daughters dying without Issue, the Heirs at Law by the Will had her part, without saying until the other Daughter died without Issue.

1. From these Cases I first conclude, That only possible implication by a Will, shall not give the Land from the right Heir, but a necessary implication which excludes the right Heir, shall give it.

2. That

2. That the difference taken is not ſound, That one ſhall not take, by implication of a Will, any Land where the ſame perſon hath other Land or Goods expreſly deviſ'd by the ſame Will; for if the implication be neceſſary, the having of Land, or any other thing, by expreſs deviſe, will not hinder another taking alſo by implication, as appears in the three Caſes by me made uſe of, viz. 13 H. 7. 3 E. 6. 15 Eliz. cited out of Moore.

3. Whether any thing be given expreſly by Will, or not, a poſſible Implication only ſhall not diſinherit the Heir, where it may as well be intended that nothing was deviſ'd by implication, as that it was. But if any man think that to be material, in this Caſe the Daughters had reſpective Portions expreſly deviſ'd them, viz. Six hundred pounds to each of them, and therefore ſhall not have the Land alſo by implication only poſſible to diſinherit the right Heir.

Queſt. 2.

For the ſecond point, Theſe words (My Will is, if it happen my Son *George*, *Mary* and *Katherine* my Daughters, to dye without Iſſue of their Bodies lawfully begotten, then all my Free-lands ſhall remain and be to my ſaid Nephew *William Roſe* and his Heirs for ever) are ſo far from importing a deviſe of the Land to the Son and Daughters for their lives, with reſpective Inheritances in tail by any neceſſary implication, that both Grammatically, and to common intendment, they import only a designation and appointment of the time when the Land ſhall come to the Nephew, namely when *George*, *Mary*, and *Katherine* happen to dye Iſſueleſs, and not before.

And where the words of a Will are of ambiguous and doubtful conſtruction, they ſhall not be interpreted to the diſinheriting of the right Heir, as is already ſhew'd.

This being clear, That there is no deviſe by this Will of the Land by implication in any kind to the Son and Daughters, it follows that *Katherine*, the ſurviving Daughter of the Teſtator, and Leſſor of the Plaintiff, had no Title to enter and make the Leaſe to the Plaintiff *Gardner*; and then as to the Caſe in queſtion before us, which is only, Whether the Defendants be culpable of Ejecting the Plaintiff? It will not be material whether

The deviſe to the Nephew, *William Roſe*, be void or not; and if not void, how and when he ſhall take by the deviſe, which may come in queſtion perhaps hereafter.

4. But

But to that point *ex abundante*, and to make the Will not ineffectual in that point of the devise to the Nephew, if no Estate for lives, or other Estate, be created by this Will by Implication to the Son and Daughters, it follows, That the Nephew can take nothing by way of Remainder, for the Remainder must depend upon some particular Estate, and be created the same time with the particular Estate. The Remainder is the residue of an Estate in Land depending upon a particular Estate, and created together with the same, and the Will creating no particular Estate, the consequent must be, That the Land was left to descend in Fee-simple to the heir at law, without creating either particular Estate or Remainder upon it. Cok. Litt. f. 49.

Sir Edward Coke hath a Case, but quotes no Authority for it; If Land be given to H. and his heirs, as long as B. hath heirs of his body, the Remainder over in Fee, the Remainder is void, being a Remainder after a Fee-simple, though that Fee-simple determines when no heirs are left of the body of B. whether that case be law or not, I shall not now discuss; in regard that when such a base Fee determines for want of Issue of the body of B. the Land returns to the Grantor and his heirs, as a kind of Reversion, and if there can be a Reversion of such Estate, I know not why a Remainder may not be granted of it, but for the former reason, this can be no Remainder, because no particular Estate is upon which it depends; and if the Lord Coke's Case be law, it is the stronger, that no Remainder is in this Case. Cok. Litt. f. 18.  
2. Sect. 11.

But without question, a Remainder cannot depend upon an absolute Fee-simple by necessary reason; for when all a man hath of Estate, or any thing else, is given, or gone away, nothing remains but an absolute Fee-simple, being given or gone out of a man, that being all, no other or further Estate can remain to be given or dispos'd, and therefore no Remainder can be of a pure Fee-simple.

To this purpose is the Case of *Hearne and Allen* in this Court. 2 Car. 1. Cr. f. 57.  
Richard Keen sells'd of a Messuage and Lands in Cheping-Norton, having Issue Thomas his Son, and Anne a Daughter by the same Venter, devis'd his Land to Thomas his Son, and his heirs forever; and for want of heirs of Thomas, to Anne and her heirs, and died.



It became a Question, Whether Thomas had an Estate in Fee or in Tail by this Will, for he could not dye without heir if his Sister outlived him, who was to take according to the intent of the Devisor? Two Judges held it (and with reason) to be an Estate tail in Thomas, and the Remainder to the Daughter, who might be his heir, shew'd, That the Devise to him and his heirs could be intended only to be to him and the heirs of his body; But three other Judges held it to be a devise in Fee, but all agreed, if the Remainder had been to a Stranger it had been void, for then Thomas (which is only to my purpose) had had an absolute Estate in Fee, after which there could be no Remainder, which is undoubted law.

The Case out of Coke's Littleton, and this Case, are the same to this purpose, That a Remainder cannot depend upon a Fee-simple; yet in another respect they much differ: For in this last Case, after an Estate in Fee devis'd to Thomas, and if he died without heir, the Remainder to a Stranger or Sister of the half blood, not only the Remainder was void as a Remainder, but no future devise could have been made of the land by the Devisor; for if Thomas died without heir the land escheated, and the Lords Title would precede any future devise.

But in that Case of Sir Edward Coke, which he puts by way of Example, if it be put by way of devise, That if land be devised to H. and his heirs as long as B. hath heirs of his body, the Remainder over, such later devise will be good, though not as a Remainder, yet as an Executory devise, because somewhat remain'd to be devis'd when the Estate in Fee determin'd upon B. his having no Issue of his Body.

And as an Executory Devise, and not as a Remainder, I conceive the Nephew shall well take in the present Case. And the intention of the Testator, by his Will, will run as if he had said, I leave my Land to descend to my Son and his Heirs, according to the Common Law, until he, and both my Daughters, shall happen to dye without Issue; And then I devise my Land to my Nephew William Rose, and his Heirs. Or as if he had said, my Son shall have all my Land, To have and to hold, to him and his Heirs, in Fee-simple, as long as any Heirs of the bodies of A. B. and C. shall be living, and for want of such Heirs, I devise my Land to my Nephew William Rose and his Heirs. The Nephew shall take as by a future and Executory Devise.

And

And there is no difference, whether ſuch deviſe be limited upon the contingent of three Strangers dying without Heirs of their bodies, or upon the contingent of three of the Deviſors own Children, dying without Heirs of their Bodies; for if a future deviſe may be upon any contingent, after a Fee-ſimple, it may as well be upon any other contingent, if it appear by the Will the Teſtator intended his Son and Heir ſhould have his Land in Fee-ſimple.

This way of Executory deviſe after a Fee-ſimple of any nature, was in former Ages unknown, as appears by a Caſe in the Lord Dyer, 29 H. 8. f. 33. concerning a Deviſe to the Prior of St. Bartholomew in Weſt-Smithfield, by the clear Opinion of Baldwin and Fitz herbert, the greateſt Lawyers of the Age.

But now nothing more ordinary. The Caſes are for the moſt part remembred in Pell and Browns Caſe, that is, Dyer f. 124. Ed. Clarch his Caſe, f. 330. b. & 354. Wellock & Hamonds Caſe cited in Borafſons Caſe, 3. Rep. Fulmerſton & Stewards Caſe, &c.

I ſhall inſtance two Caſes. The firſt is Haynſworths and Prettyes Caſe, Where a man ſei'd of Land in Soccage, having Iſſue two Sons and a Daughter, deviſ'd to his youngeſt Son and Daughter Twenty pounds aſſeſe, to be paid by his eldeſt Son, and deviſ'd his Lands to his eldeſt Son and his Heirs, upon Condition if he paid not thoſe Legacies, that his Land ſhould be to his ſecond Son and Daughter, and their Heirs. The eldeſt Son fail'd of payment. After Argument upon a Special Verdict, It was reſolv'd by the Court clearly, That the ſecond Son and Daughter ſhould have the Land.

1. For that the deviſe to his Son and his Heir in Fee, being Hill. 41. El. Cr. 833. a.

2. That it was a future deviſe to the ſecond Son and Daughter, upon the contingent of the eldeſt Sons default of payment.

3. That it was no more in effect than if he had deviſ'd, That if his eldeſt Son did not pay all Legacies, that his land ſhould be to the Legatees, and there was no doubt in that Caſe, but the land, in default of payment, ſhould veſt in them.

Which Caſe, in the reaſon of law, differs not from the preſent Caſe, where the land is deviſ'd by deviſe future and executory to the Nephew, upon a contingent to happen by the Teſtators Son and Daughters having no iſſue.

18 Jac. Pell &  
Browns C.  
Cro. f. 590.

The second Case is that of Pell and Brown, the Father being seisd of certain land, having Issue William his eldest Son, Thomas and Richard Brown, devis'd the land to Thomas and his Heirs for ever; and if Thomas died without Issue, living William, then William should have the lands to him, his Heirs and Assigns.

1. This was adjudg'd an Estate in Fee-simple in Thomas.
2. That William by way of Executory devise, had an Estate in Fee-simple in possibility, if Thomas died without Issue before him.

And it being once clear, That the Estate of Thomas was a Fee-simple, determinable upon a contingent, and not an Estate tail, and so in the present case it being clear'd, that George, the Testator's Son, had the land descended to him in Fee from the Testator, and took no Estate tail expressly, or by implication from the Will, it will not be material whether the Contingent which shall determine that Fee-simple proceeds from the person which hath such determinable Fee, or from another, or partly from him, and partly from another, as in Haynsworth's Case, the Son determined his Fee-simple by not paying the Legacies; in Pell and Brown's Case, Thomas his Fee-simple determined by his dying without Issue, living William, the Fee-simple vested in George the Son by descent, determines when he and his two Sisters dye without Issue; and upon such determination in every of these Cases, the future and executory devise must take effect.

But the great Objection is, That if this should be an executory devise to the Nephew, upon the contingent of George the Son, and both his Sisters dying without Issue. It will be dangerous to introduce a new way of perpetuity; for if a man have several Children, and shall permit his Estate to descend, or by his Will devise it to his Heir, so as he may therein have an unquestionable Fee-simple (which is the same with permitting it to descend) he may then devise it futurely, when all his Children shall dye without Issue of their bodies to J. S. and his Heirs, as long as A. B. and C. strangers, shall have any Heirs of their bodies living, and then to a third person by like future devise: For if he should devise it futurely to J. S. and his Heirs, as long as J. S. had any Heirs of his body, it were a clear Estate tail in J. S. upon which no future devise could be, but it would be a Remainder to be docked.

This

This Objection was in some measure made by Doderidge in Pell and Browns Case, and the Judges said there was no danger, because the Estate in Fee of Thomas did not determine by his dying without Heir of his body generally, but by dying without Issue, living William; for if the land had been given to Thomas and his Heirs for ever, and if he died without Heirs of his body, then to William and his Heirs, Thomas his Estate had been judg'd an Estate tail with the Remainder to William, and not a Fee, upon which no future or executoy devise can be. So was it adjudg'd in Foy and Hinds Case 22 Jac. Cr. f. 695. & 6. and anciently 37 Aff. p. 18. & H. 5. f. 6. and to be within the reason of Mildmay and Corbets Case of Perpetuities.

Vid. Stiles  
Rep. Gay &  
Gaps Case,  
258, 275.

But in Pell and Browns Case, the Judges said it was more dangerous to destroy future devises, than to admit of such Perpetuities as could follow from them any way by determinable Fee-simples, which is true; for a Fee simple, determinable upon a contingent, is a Fee-simple to all intents, but not so durable as absolute Fee-simples. And all Fee-simples are unequally durable, for one will escheat sooner than another by the failure of Heirs. An Estate of Fee-simple will determine in a Bastard with his life, if he want Issue. An Estate to a man and his Heirs as long as John Stiles hath any Heir, which is no absolute Fee-simple, is doubtless as durable as the Estate in Fee which John Stiles hath to him and his Heirs, which is an absolute Fee-simple. Nor do I know any Law simply against a Perpetuity, but against Intails of Perpetuity, for every Fee-simple is a perpetuity, but in the accident of Alienation, and Alienation is an incident to a Fee-simple determinable upon a contingent, as to any more absolute or more perdurable Fee-simple.

The Chief Justice, Justice *Archer*, and Justice *Wylde* for the Defendant. Justice *Tyrrell* for the Plaintiff.

Judgment for the Defendant.

Hill



Hill. 21 & 22 Car. II. C. B.

*Craw* versus *Ramsley*.

*Philip Craw* is Plaintiff, and *John Ramsley* Defendant,  
In an Action of *Trespass* and *Ejectment*.

**T**HE Plaintiff declares, That Lionel Tolmach Baronet, and Humphrey Weld Esquire, January the Twentieth, the Sixteenth of the King, demis'd to the Plaintiff the Mannor of Kingston, with the appurtenances, in the County of Surrey, one Messuage, two Barns, one Dove-house, two Gardens, eighty Acres of Land, and ten Acres of Meadow, with the appurtenances in Kingston aforesaid, and other places, and also the Rectory of Kingston aforesaid, To have and to hold to the said *Philip* and his Assignes, from the Feast of the Nativity last past, for five years next ensuing. By virtue whereof he entred into the Premises, and was possessed, until the Defendant, the said Twentieth of January in the Sixteenth year of the King, entred upon him, and Ejected him with force, to his Damage of Forty pounds.

To this the Defendant pleads he is not Culpable.  
Upon a Special Verdict it appear'd, That

Robert Ramsley, Alien, Antenatus, had Issue 

1. Robert
2. Nicholas
3. John
4. George

 Antenatos

Robert the son, had Issue 

Margaret
Isabel
Jane

 Antenatas, living the First of *Octob.* 14 Car. 1. and now have Issue at Kingston.

John naturalized, 9. Maii, 1 Jac.

*John*, the third son, by the name of Sir *John Ramsley*, was naturalized by Act of Parliament, holden at *Westminster*, May the Ninth, 1. Jac. and after made Earl of *Holdernes*.

*George*

George Ramsey, the fourth Son, was naturalized in the fourth Session of Parliament held at Westminster, begun by Prorogation, 19 Febr. 17 Jac. and after had Issue John primogenitum filium, Quodque idem Johannes had Issue John the now Defendant, primogenitum suum filium, but finds not where either of these were born, nor the death of George.

George natu-  
ralized, 7 Jac.

Nicholas the second Son, had Issue Patrick his only Son, born at Kingston, after the Union, 1 Maii, 1618. about 15 Jac.

Nicholas had  
Issue Patrick  
a Native, 15  
Jac.

John the third Son, Earl of Holdernes, seiz'd of the Mannors, Rectory, and Premises in the Declaration mentioned, with other the Mannors of Zouch and Taylboys, and divers other Lands in the County of Lincoln in Fee, by Indenture Tripartite between him on the first part, Sir William Cockayne and Martha his Daughter of the second part, &c. Dated the First of July, 22 Jac. Covenanted to levy a Fine before the Feast of St. Andrews next ensuing to Sir William of all his said Lands, To the use of himself for life, then to the use of Martha, his intended Wife, for life, with Remainder to the Heirs Males of his body begotten on her, Remainder to such his Heirs Females, Remainder to his right Heirs.

John cove-  
nanted to le-  
vy a Fine de  
Premissis, 1  
Jul. 22 Jac.

The Marriage was solemnized the Seven and twentieth of Sept. 22 Jac.

John married  
29 Sept. 22  
Jac.

The Fine accordingly levied in the Common Pleas Octabis Michaelis, 22 Jac. of all the Lands and Premises among other in the Declaration mentioned.

He levied the  
Fine Octab.  
Michael. 22  
Jac.

The Earl, so seiz'd as aforesaid, with the Remainder over at Kingston aforesaid, died the Four and twentieth of January, 1 Car. 1.

John died 1  
Car. 1. Jan. 24

His Countess entred into the Premises in the Declaration mentioned, and receiv'd the Profits during her life.

After the Earls death a Commission issued, and an Inquisition taken at Southwark in Surrey the Nine and twentieth of February, 7 Car. 1.

Inquisition  
after his  
death cap.  
29 Febr.  
7 Car. 1.

By this Inquisition it is found the Earl died seiz'd of the Mannor of Zouch and Taylboys, and divers Land thereto belonging in Com. Lincoln, and of the Mannor of Westdeerham, and other Lands in Com. Norfolk, and of the Rectory of Kingston, and of the Advowson of the Vicaridge of Kingston in Com. Surrey, but no other the Lands in the Declaration are found in that Office. And then the Tenures of those Mannors are found, and that the Earl died without Heir. But it finds that the Earl so seiz'd, levied a Fine of the Premises to Sir William Cockayne, per nomina Maneriorum de Zouches & Taylboys, & Rectoriae de Kingston, cum omnibus Decimis dictae Rectoriae pertinentibus, and finds the uses as supra, and so finds his dying without Heir, &c. It finds the Fine levied in terminis

*terminis Michaelis*, 22 *Jac.* but not in *Oſtavis Michaelis*, as the Special Verdict finds, but between the ſame perſons.

The Irish Act  
to naturalize  
all Scots, 4  
Jul. 10 Car. 1.

Nicholas died  
1 Sept.  
10 Car. 1.

Murrey's Pat.  
25 Octob.  
10 Car. 1.

The general Act of Naturalizing the Scottiſh Antenati in the Kingdom of *Ireland*, was made in the Parliament there, begun at the Caſtle of *Dublin* the Fourth of *July*, 10 *Car. 1.*

*Nicholas* died the Firſt of *September*, 10 *Car. 1.* Leaving Iſſue *Patrick*.

King *Charles* the Firſt, by his Letters Patents dated the Five and twentieth of *October*, the Tenth of his Reign, under the Great Seal, granted to *William Murrey*, his Heirs and Aſſigns, in Fee farm, All the ſaid Mannors, Lands, and Rectory, mentioned in the Declaration, with the Reverſion depending upon any life, lives, or years.

*Patrick* conveys to the  
Earl of *Elkin*  
16 Febr. 1651.

*Patrick* and *Elizabeth* his wife, by Indenture dated the Sixteenth of *February* 1651. Covenant with the Earl of *Elkin* and Sir *Edward Sydenham* in conſideration of Eleven hundred pounds, and bargained and ſold the Premiffes in the Declaration to them and their Heirs, and covenanted at the Earls charge to levy a Fine with proclamation, to the uſe of the Earl and his Heirs, of the Premiffes, before the end of *Eaſter Term* next, and accordingly did levy it with warranty againſt them, and the Heirs of *Patrick*, by force whereof, and of the Statute of Uſes, the ſaid Earl and *Sydenham* were ſeiz'd, &c.

*Patrick* &  
Uxor. levy a  
Fine & die  
Paſche in fif-  
teen days.

The Earl and  
*Sydenham*  
convey to  
the Counteſs  
Dowager,  
10 Mar. 1652.

The Earl of *Elkin* and *Sydenham*, by Indenture of Leafe, dated the Tenth of *March*, 1652. and by Deed of Releaſe and Confirmation, convey the Premiffes to *Amabel* Dowager of *Kent*, and the Lady *Jane Hart*, viz. the Eleventh of *March*, 1652. by way of Bargain and Sale to them and their Heirs, who entred by the Leafe, and were in quiet poſſeſſion at the time of the Releaſe.

The Dowager  
conveys to  
*Pullayne* and  
*Neale*.

The Dowager and Lady *Hart* by like Conveyance of Leafe and Releaſe, bargained and ſold to *Pullayne* and *Simon Neale*, dated the Firſt and Second of *November*, 1655. who entred, and were in poſſeſſion as aforeſaid.

*John Ramſey* the now Defendant, entred in 15 *Car. 2.* and kept poſſeſſion.

Dat. 25 Sept.  
1656. *Pul-  
layne* and  
*Neale* convey  
to *Talmuch*  
and *Weld* by  
Bargain and  
Sale.  
20 Jani 16  
*Car. 2.*

*John Pullayne* and *Symon Neale*, by Deed of Bargain and Sale, duly inrolled, convey'd the Premiffes to *Lionel Talmuch* and *Humphrey* their Heirs and Aſſigns.

*Lionel* and *Humphrey* demis'd to *Philip* the Plaintiff having entred, and being in poſſeſſion by Indenture, dated the Twentieth of *January*, 16 *Car. 2.* *John* then in poſſeſſion, and *John* re-entred upon the Plaintiff, and Ejected him.

The Questions upon this Record will  
be three.

1. Whether a Naturalization in Ireland will naturalize the person in England? If it will not, all other Questions are out of the Case.

2. If it will, then whether by that Act for naturalizing the Antenati of Scotland any, his brothers, had title to inherit the Earl of Holdernes in the lands in question? By reason of the Clause in the Act of Naturalization, That nothing therein contained should extend to avoid any Estate or Interest in any Lands or Hereditaments, which have already been found, and accrewed to his Majesty, or to King James, for want of naturalization of any such person, and which shall and doth appear by Office already found and return'd, and remaining of Record, or by any other matter of Record.

An Office was found, as appears by the Verdict 7 Car. afoze the Act, by which it is found he died seised of the Rectory of Kingston in Reversion, and of the Advowson of the Vicaridge, and died without Heir, and that the same escheated to the King; and if all the lands in question were held of the King, it being found he died without Heir, the proviso will save all to the King.

3. Whether Nicholas Ramsay, under whom the Plaintiffs claim, be the person who had title to the lands in question, if any had? Because

1. The death of Robert the elder Brother, is not sufficiently found before the Act of Naturalization, for then he, and not Nicholas, was Heir to John.

2. Because if Robert the elder were dead before, yet he left Issue three Daughters, who were naturalized as well as Nicholas by the Act, and are the heirs to the Earl, being the Issue of his elder Brother.

If Robert had died after the Irish Act made, this Verdict had been as true as now it is: Therefore it is not sufficient to find him dead before the Act.



Et Juratores ulterius dicunt quod prædictus *Robertus* filius primogenitus, & natus maximus prædicti *Roberti* patris postea obiit, tempore mortis suæ habens & relinquens tres filias de corpore ipsius *Roberti* filii legitime procreatas, viz. *Margaret. Isabel. & Janam* Alienigenas natas in Regno *Scotia* ante accessionem prædicti. Quæ quidem *Margaret. Isabella, & Jana*, primo die *Octobris*, Anno Regni Domini *Caroli* nuper. Regis *Anglia* primi, quarto decimo, in plena vita fuerant, & habent exitus de earum corporibus exeuntes modo superstites, & in plena vita existentes apud *Kingston* super *Thames* prædicti.

As to the second part, in the Case of Aliens, nothing interrupts the common course of Descents, but Defectus Nationis, as Bracton terms it. Therefore that being taken away by naturalization, they shall inherit as if it had not been, and then the eldest Brothers Issue had inherited before the second Brother.

1. It is admitted, and will easily appear, That one naturalized in Scotland since the Union, cannot inherit in England.

2. Ireland then differs from Scotland, in a common difference with Gernsey, Jersey, Isle of Man, Berwick, and all the English Plantations, for that they are Dominions belonging to the Crown of England, which Scotland is not.

3. If this difference, which was never discussed in Calvin's Case, alter not the Case from a naturalizing in Scotland, it remains, whether by Act of Parliament of England, though not extant, Ireland in this matter be not differenc'd from other Dominions belonging to England?

1. He that is privileged by the law of England to inherit there, must be a Subject of the Kings.

2. He must be more than a local Subject, either in the Dominion of England, or out of the Dominion of England; for meer Aliens, when locally in England, or any other Dominions of the Kings, are local Subjects.

3. He must be otherwise a Subject than any Grant or Letters Patents of the King can make him: Therefore a Denizen of England by Letters Patents for life, in tail, or in fee, whereby he becomes a Subject in regard of his person, will not enable him to inherit in England, but according to his Denization, will enable his Children born in England to inherit him, and much less will his Denization in any other Dominion.

7 Rep. Calvin's C. f. 7. a.  
36 H. 6. Tit.  
Deniz. Br. 9.

thence

Thence it follows, That no Laws made in any other Dominion acquired by Conqueſt, or new Plantation, by the King's Lieutenants, Subſtitutes, Governours, or People there, by vertue of the King's Letters Patents, can make a man inherit in England, who could not otherwiſe inherit: For what the King cannot do by his Letters Patents, no delegated power under him can do by his Letters Patents.

It follows likewiſe upon the ſame reaſon, That no tenure of Land, by Homage, Fealty, or other Service in any other Dominion of the Kings, acquired by Conqueſt, or otherwiſe by any Grant or Letters Patents, can make a man inherit in England, who could not otherwiſe inherit, for that is not Homagium ligeum, but Feodale, as is rightly diſtinguiſhed.

Calvin's Caſe,  
f. 6. b.

4. A man born a Subject to one that is King of England, can not therefore inherit in England, for then the Antenati in Scotland had inherited in England; they were born Subjects to King James, who was King of England; but not born when he was King of England.

5. A Subject born in any Dominion belonging to the Crown of England, is inheritable in England as well as native Engliſhmen. So the natural born Subjects of Ireland, Gerſey, Jerſey, Berwick, and all the Engliſh Plantations inherit; but the ſpecific reaſon of their inheriting in England, is not becauſe they are born in Dominions belonging to the Crown of England, for if ſo, none could inherit who wanted that, and then the Poſtnati of Scotland ſhould not inherit; for Scotland is not a Dominion belonging to the Crown of England, but to the King of England.

It remains then, according to the Reſolution and Reaſons of Calvin's Caſe, That the ſpecific and adequate cauſe, why the Kings Subjects of other his Dominions than England, do inherit in England, is, becauſe they are born his natural Subjects as the Engliſh are, he being actually King of England at the time of their birth, when their ſubjection begins; and ſo are born Liege-men to the ſame King.

Cok. Rep.  
Calvin's Caſe.

But then, ſince all Liegeance and Subjection are acts and obligations of Law (for a man owes no liegeance excluding all Civil Law) but a man is ſaid a natural Subject, becauſe his Subjection begins with his birth, that is, as ſoon as he can be ſubject, and a King is ſaid to be a man's natural Prince, becauſe his Protection begins as ſoon as the Subject can be protected, and in the ſame ſenſe, that a Country where a man is born, is his natural Country, or the Language he firſt ſpeaks, is his natu-

ral Tongue ; why should not an Act of Law , making a man as if he had been bozn a Subject , work the same effect as his being bozn a Subject , which is an effect of law ?

1. The Reason is , That naturalization is but a fiction of Law , and can have effect but upon those consenting to that fiction : Therefore it hath the like effect as a mans Birth hath , where the Law-makers have power , but not in other places where they have not. Naturalizing in Ireland gives the same effect in Ireland as being bozn there , so in Scotland as being bozn there , but not in England , which consents not to the fiction of Ireland or Scotland , nor to any but her own.

2. No fiction can make a natural Subject , for he is correlative to a natural Prince , and cannot have two natural Sovereigns ( but may have one Sovereign , as a Queen Sovereign and her Husband in two persons ) no more than two natural Fathers , or two natural Mothers. But if a fiction could make a natural Subject , he hath two natural Princes , one where he was bozn , and the other where naturalized.

3. If one naturalized in Ireland should in law make him naturally bozn there , then one naturalized in Scotland , after the Union , should make him naturally bozn there , consequently inheritable in England , which is not contended.

4. A naturalized person in a Dominion belonging to England , is both the King's Subject when he is King of England , and inheritable in that his Dominion , when naturaliz'd.

So the Antenati of Scotland are the King of England's Subjects when he is King of England , and inheritable in that Dominion of his , yet cannot inherit in England ; and being his Subjects before , doth not make them less his Subjects when King of England ; Or if it did , Nicholas Ramsey , before he was naturalized in Ireland , and became there a Subject to the King of England , was a Subject in Scotland of the Kings.

There

There are four ways by which men born out of *England* may inherit in *England*, beſides by the Statute of *Edward* the Third, *De Natis ultra Mare*.

1. If they be born in any Dominion of the Kings when he is actually King of England.

2. If they be made inheritable by Act of Parliament in England, as by naturalization there.

3. If they be born Subjects to a Prince, holding his Kingdom or Territories as Homager and Liegeman to the King of England, during the time of his being Homager. So the Welch were inheritable in England before 12 Ed. 1. though Subjects to the Princes of Wales, who were Homagers to the King of England. So were the Scotch in Edward the First's time, during the King of Scotland's Homage to him, and to other Kings of England, as long as it continued. And that is the reason of the Case in 14. of Eliz. in the Lord Dyer, where a Scotch-man being arraign'd for a Rape of a Girl under Seven years of Age, and praying his Trial per medietatem Linguae, because he was a Scot born, it was denied him by the Opinion of the Judges of both Benches, for that, among other reasons, a Scot was never accounted an Alien here, but rather a Subject (So are the words of the Book) But they did not consider that the Homage was determined then, as it was consider'd after in Calvin's Case, when only the Postnati of Scotland were admitted inheritable in England. Upon the same ground one Magdolph, Subject to the King of Scots, appeal'd from his Judgment to Edward the First, ut Superiori Domino Scotiae. Calvin's Case, f. 21. b. Dyer 14 Eliz. f. 304. pl. 51.

But this is to be understood where such Prince is Homager. Subjectionis, and not only Infeodationis; for another King may hold of the King of England an Island, or other Territory, by Tenure, and not be his Subject.

4. If the King of England enter with his Army hostily the Territories of another Prince, and any be born within the places possessed by the Kings Army, and consequently within his Protection, such person is a Subject born to the King of England, if from Parents Subjects, and not Poſſile.



5 Eliz. Dyer  
f. 224 pl. 29.

So was it resolved by the Justices 5 Eliz. That one boyn in Tourney in France, and conquered by Henry the Eighth, being a Bastard between persons that were of the King's liegeance, was enabled to purchase and implead within the Realm, and was the same as if a French-man and French-woman should come into England, and have a Son boyn there. The like law if he had been boyn of French Parents in Tourney, for it was part of the Dominions belonging to England pro tempore, as Calice was.

Those under the King's Power, as King of England, in another Prince his Dominions, are under his Laws.

Fleta. l. 2. c. 3.  
14 E. 1.

King Edward the First being at Paris 14 E. 1. one Ingelram de Nogent stole silver Dishes in the King's House there, and after dispute about his Cryal with the King of France and his Council, he was convicted before the Steward of the King of England's House, and executed, though the Felony was done in France, in Alieno Regno.

Fleta. l. 2. c. 3.  
12 E. 1.

So Edmund de Murdak brought an Appeal in Gascoigne, coram Seneschallo Hospitii Regis Angliæ against one William de Lesnes of Robbery done to him, 12 E. 1. infra metas Hospitii Regis infra quas invenit ipsum. And the Defendant, non posuit appellum illud per exceptionem alterius Regni declinare.

1. Regularly who once was an Alien to England, cannot be inheritable there, but by Act of Parliament, which is Common Experience.

But Ramsey was an Alien to England, being Antenatus of Scotland, and therefore cannot inherit here but by Act of Parliament.

If it be said there is an Exception to that, viz. unless he be naturalized in Ireland; that Exception must be well prov'd, not suppos'd: For the Question being, Whether one naturalized in Ireland do thereby become as a Native of England? must not be resolv'd by saying, That he doth become as a Native of England, otherwise it is prov'd only by begging the Question.

2. The being no Alien in England belongs not to any made the King of Englands Subject by Act of Law, when he is King of England, but to such as are boyn so.

Natural

Natural legitimation respecteth actual Obedience to the Sovereign at the time of the birth, for the Antenati remain Aliens, because they were born when there were several Kings of the several Kingdoms; not because they are not by act of law afterwards become Subjects to the King of England by the Union of the Crowns: But he that is naturaliz'd in Scotland or Ireland, is not a Subject born to the King of England, but made by a subsequent Act in law. Calvins Case, f. 27.

3. And chiefly the manner of subjection of a Stranger naturaliz'd in Scotland or Ireland, doth exactly agree with that of the Antenatus, and not of the Postnatus. For,

1. The Antenatus was another Prince his Subject, before he was the King of England.

2. The Antenatus might have been an Enemy to England, by a war between the several Kings before the Union.

So a Stranger naturalized in Scotland or Ireland, was the natural Subject of some other Prince necessarily before he was naturaliz'd, and then might have been an Enemy to the King of England, by a war between his natural Sovereign and the King of England, before he was naturalized.

But the Postnatus was never Subject to any before he was the King of England, nor ever in possibility of being an enemy to England, both which are the properties of subjection in the native English Subject, and is the reason why the Postnatus in England is as the Natives of England.

No fiction of Law can make a man a Natural Subject that is not, for a Natural Subject and a Natural Prince are Relatives, and if an Act of Naturalization should thereby make a man a natural Subject, the same Subject would have two natural Sovereigns, one when he was born, the other when naturalized, which he can never have more than two Natural Fathers, or two Natural Mothers, except the Sovereigns be subordinate, the Inferior holding his Kingdom as Liege Vassal from the Superior.

And perhaps in the Case of Severing the Kingdoms, as Sir Edward Coke saith. Calvins Case 27.

Nor can an Act of Parliament in one place take away the natural subjection due to another Prince for want of power.

And

And the Law of England being, That an Alienatus shall not inherit, because an Alien, without an Act of Parliament making him none: The fiction of an Act in another Kingdom, to which England never consented, shall not alter the law here, because he is made in Ireland as if born there.

If there were an Act of Parliament in England, That persons naturalized in Ireland or Scotland, should be no Aliens in England, no man thinks that thereby Scotland or Ireland could naturalize a man in terminis in England. But a man naturalized there, would by consequent be naturalized in England, because the law of England did warrant that consequent.

But to say, That a man naturalized in Ireland is not directly naturalized in England, but by consequent, when the question is, Whether one naturalized in Ireland be thereby naturalized in England? is to beg for a proof that which is the question.

Therefore it must be first proved, That there is a Law of England to warrant that consequent.

### Inconveniencies.

The Law of England is, That no Alien can be naturalized but by Act of Parliament, with the assent of the whole Nation.

1. Now if this naturalization in Ireland should be effectual for England, then a whole Nation should become Natives in England, without Act of Parliament, of what Country, Religion, or Manners soever they be, by an Act of Ireland.

2. If the Parliament of England should refuse to naturalize a number of men, or Nation, as dangerous or incommodious to the Kingdom, yet they might be naturalized, whether the Houses of Parliament would or not, by an Act of Ireland.

3. By this invention the King may naturalize in England without an Act of Parliament, as well as he may Denizen; for if the Parliament of Ireland enact, That the King, by Letters Patents, shall naturalize in Ireland, then they so naturalized in Ireland by Patent, will be naturalized in England by consequent, so they may enact the Deputy or Council of Ireland to naturalize.

4. If an Alien hath Issue an Alien Son, and the Father be denizen'd in England, and after hath a Son boyn in England, the Law hath been taken, That the youngest Son shall inherit the Fathers Land. So is Sir Edward Coke Litt. f.8.a. and other Books; yet if the elder be naturaliz'd in Ireland, the Estate which the youngest hath, by the Law of England, will be plucked from him.

Co. Litt. f.8.a.  
 Doct Stud. l.1.  
 Cr. 17 Jac. f.  
 539. Godfrey  
 & Dixons C.

Having thus opened the Inconveniences consequent to this Irish Naturalization, the next is, That Judges must judge according as the Law is, not as it ought to be. But then the Premisses must be clear out of the established Law, and the Conclusion well deduc'd before great Inconveniences be admitted for Law. But if Inconveniences necessarily follow out of the Law, only the Parliament can cure them.

1. I shall begin with the admitted Doctrine of Calvin's Case. By that Case, He that is boyn a Subject of the King of England in another Dominion than England, is no Alien in England. So the Scots, boyn when the King of Scots was King of England, are no Aliens; those boyn before in Scotland are. Therefore Nicholas Ramsey, who is not boyn the Kings Subject of Ireland, must be an Alien in England, whose Law, by the Rule of that Case, makes only Subjects boyn, and not made of another Dominion, not to be Aliens in England.

2. It is agreed to my hand, That an Alien naturalized at this day in Scotland, remains an Alien in England notwithstanding.

3. By the Doctrine of Calvin's Case, a natural boyn Subject to the Kings person of a Forraign Dominion, is not priviledg'd in England from being an Alien, else the Antenati of Scotland were priviledg'd, for they are natural boyn Subjects to the Kings person, as well as the Postnati.

4. It stands not with the Resolution of that Case, That the natural boyn Subjects of the Dominions belonging to the Crown of England (qua such) should be no Aliens in England, which was the principal matter to have been discuss'd, but was not, in Calvin's Case, and chiefly concerns the point in question.



The Caſe relied on to juſtifie the Judgment in Calvins Caſe are ſeveral Authorities, That the King of England's Subjects formerly were never accounted Aliens in England, though they were all out of the Realm of England, and many within the Realm of France. But all theſe are admitted in that Caſe (as moſt of them were) Dominions belonging to the Crown of England; and if ſo,

Normandy,  
 Brittain,  
 Aquitain,  
 Anjou,  
 Gascoigne,  
 Guien,  
 Calais,  
 Of Jerſey and Gernſey,  
 Iſle of Man,  
 Berwick and other  
 Parts of Scotland,  
 Ireland,  
 Tourney, &c.

What Inference could be made for the Reſolution of Calvin's Caſe? That becauſe the Kings natural Subjects of Dominions belonging to the Crown of England, as theſe did, were no Aliens in England: Therefore that Subjects of a Dominion not belonging to the Crown, as the Poſtnati of Scotland are, ſhould be no Aliens in England, Non ſequitur.

Therefore it is for other reaſon then, becauſe natural Subjects of Dominions belonging to the Crown of England, they were no Aliens by the meaning of that Reſolution. And the Adequate Reaſon being found out, why they are not Aliens, will determine the point in queſtion.

1. It was not becauſe they were natural Subjects to him that was King of England, for then the Antenati of Scotland would be no Aliens, they being natural Subjects to him that is King of England, as well as the Poſtnati.

2. It was not becauſe they were natural Subjects of Dominions belonging to the Crown of England; for then the Poſtnati would be Aliens in England, for they are not Subjects of a Dominion belonging to the Crown of England.

3. It remains then, the Reaſon can be no other, but becauſe they were born under the ſame Liegeance with the Subjects of England, which is the direct reaſon of that Reſolution in Calvins Caſe. The words are, The time of the birth is of the eſſence of a Subject born, for he cannot be a Subject to the King of England (that is, to be no Alien) unleſs at the time of his birth he was under the Liegeance and Obedience of the King (that is) of England. And that is the reaſon that Antenati in Scotland (for that at the time of their birth they were not under the Liegeance and Obedience of the King of England) are Aliens born, in reſpect of the time of their birth.

Calvins Caſe,  
 f. 18. b. a.

The

The time of his birth is chiefly to be considered, for he cannot be a Subject born of one Kingdom, that was born under the Liegeance of a King of another Kingdom, albeit afterwards one Kingdom descend to the King of the other.

Therefore Ramsay, being not under the Liegeance of the King of England at the time of his birth, must still continue an Alien, though he were naturalized in Ireland.

Notwithstanding all this, it may be urg'd,

A person naturalized in England is the same as if he had been born in England, and a person naturalized in Ireland is the same as if he had been born in Ireland.

But a person born in Ireland is the same as if he had been born, or naturalized in England. Obj. 1.

Therefore a person naturalized in Ireland, is the same as if he had been born or naturalized in England. This seems subtle and concluding.

For Answer, I say, That the same Syllogism may be made of a person naturalized in Scotland after the Union, viz.

A person naturalized in England, is the same with a person born in England; and a person naturalized in Scotland, after the Union, is the same with a person born in Scotland after the Union.

But a person born in Scotland, after the Union, is the same with a person born or naturalized in England.

Therefore a person naturalized in Scotland, after the Union, is the same with a person born or naturalized in England.

Yet it is agreed, That a person naturalized in Scotland, since the Union, is no other than an Alien in England; Therefore the same Conclusion should be made of one naturalized in Ireland.

To differ these two Cases, it may be said, That the naturalizing of a person in Scotland can never appear to England, because we cannot write to Scotland to certify the Act of Naturalizing, as we may to Ireland, out of the Chancery, and as was done in the present Case in question, as by the Record appears. Obj. 2.

This is a difference, but not to the purpose, and then it is the same as no difference; For I will ask by way of Supposition:

Admit an Act of Parliament were made in England for clearing all Questions of this kind,

That all persons inheritable, in any Dominion whatsoever, where-  
of the King of England was King, whether naturalized, or Subjects  
born, should be no Aliens in England, it were then evident by the  
Law, That a naturalized Subject of Scotland were no Alien in  
England; yet the same Question would then remain as now  
doth, How he should appear to be naturalized? because the  
Chancery could not write to Scotland, as it can to Ireland, to cer-  
tify the Act of Naturalizing.

Ans. 1.

The fallacy of the Syllogism consists in this. It is true, that  
a person naturalized in Ireland, is the same with a person born  
in Ireland, that is by the Law of Ireland. But when you as-  
sume, That a person born in Ireland is the same with a person  
born or naturalized in England, that is not by the Law of Ire-  
land, but by the Law of England. And then the Syllogism will  
have four terms in it, and conclude nothing.

Ans. 2. 3.

But to answer the difference taken, there are many things  
whereof the Kings Courts sometimes ought to be certified,  
which cannot be certified by Certiorari, or any other ordinary  
Writ.

42 E. 3. f. 2. b.  
An Act of Par-  
liament of  
Scotland may  
be evidence  
as a Sentence  
of Divorce or  
Deprivation,  
and Foreign  
Laws for rais-  
ing or aban-  
ding Money or  
Customs up-  
on account  
between Mer-  
chants, but  
not as Re-  
cords.

In the Case of the Lord Beaumont, 42 E. 3. a Question  
grew, Whether one born in Ross in Scotland were within the  
Kings Liegeance? because part of Scotland then was, and  
part not, in his Liegeance, the Court knew not how to pro-  
ceed until Thorpe gave this Rule; That doubtless the King had a  
Roll, what parts of Scotland were in his Liegeance, what not, up-  
on the Treaty or Conclusion made, that therefore they must address  
themselves to the King to have that certified. The like may now  
happen of Virginia, Surinam, or other places, part of which  
are in the Kings Liegeance, part not. So the King hath, or  
may have, Rolls of all naturalized Subjects; and upon petition  
to him, where the occasions require it, may cause the matter  
in his name to be certified. The like may happen upon emer-  
gent Questions upon Leagues or Treaties, to which there is no  
common access, but by the Kings permission.

For illustration, a feign'd Case is as good as a Case in fact.  
5 El. c. 4. f. 957 Suppose a Law in Ireland, like that of 5. of the Queen, That  
no man should set up Shop in Dublin, unless he had serv'd as  
an Apprentice to the Trade for Seven years; and suppose a Law  
in England, That whosoever had served Seven years as an Ap-  
prentice in Dublin, might set up Shop in London. If by a par-  
ticular Act of Parliament in Ireland J. S. be enabled to set up  
Shop in Dublin, as if he had serv'd an Apprenticeship for Seven  
years, by this fiction he is enabled in Ireland to set up, but not in

in London, unless he have really served for Seven years, as the Law in England requires.

### Considerations.

That an Act of Parliament of Ireland should so operate, as to effect a thing which could not, by the Laws of England, be done without an Act of Parliament in England regularly, seems so strange, that it is suppos'd an Act of Parliament of England, did first empower the doing of it, though it be not extant by an Act of Parliament.

The Argument then is,

1. A man is naturalized in Ireland, and thereby no Alien in England, which could not lawfully be done without an Act of Parliament in England to empower the doing it.

Which in effect is to say, a thing was done which could not lawfully be done without an Act of Parliament to warrant it, Ergo, it being done, there was an Act of Parliament to warrant it.

2. This Supposition seems rather true, because other things relating to Ireland, and admitted to be Law, could not be but by Act of Parliament in England, yet no such Act is extant; that is, that a Writ of Error lies in the Kings Bench to reverse a Judgment given in the Kings Bench in Ireland.

3. That this must be by Act of Parliament, not by Common Law, because such a Writ did not lye in Wales or Calais at Common Law to reverse an Error there.

Still the Argument is no better then before: Some things are of known Law, though many successions of Ages, which could not commence without an Act of Parliament, which is not extant.

Therefore a thing wholly new, not warranted by any Testimony of former time, because it cannot be lawful without an Act of Parliament, must be suppos'd, without other proof, to be lawful by an Act of Parliament.



If the lawfulness of any thing be in question; suppose the Laws of Ireland were made the Laws of England by Act of Parliament here, only Two were material to this Question, 1. That a Postnatus of a Forraign Dominion of the Kings should be no Alien, the Law is so in Ireland. 2. That persons naturalized in England are naturalized for all the Dominions belonging to England; If the Law were so in Ireland, it follows not, That one naturalized there must be naturalized in England thereby; for England is not a Dominion belonging to Ireland, but e contrario.

Fitz. Assise  
pla. 382. 18 E. 2

A Writ of Error lies to reverse a Judgment in any Dominions belonging to England; Breve Domini Regis non currit in Wallia, is not to be intended of a Writ of Error, but of such Writs as related to Tryals by Juries; those never did run in Forraign Dominions that most commonly were governed by different Laws. Error of a Judgment in Assise of Gower's Land, in B. R. 18 E. 2.

21. H. 7. f. 31. b.

A Writ of Non molestando issued out of the Chancery to the Mayor of Calais, retortable in the Kings Bench; and by the whole Court agreed, That there are divers Presidents of Writs of Error to reverse Judgments given in Calais; though it was Objected, They were governed by the Civil Law.

7. Rep. f. 20. a.  
Calvins Case.

And Sir Edward Coke cites a Case of a Writ directed to the Mayor of Burdeaux, a Town in Gascoigny, and takes the difference between Mandatory Writs, which issued to all the Dominions, and Writs of ordinary remedy, relating to Tryals in the Kingdom.

7 Rep. Calvins  
Case, f. 18. a.

And speaking of Ireland among other things, he saith, That albeit no Reservation were in King John's Charter, yet by Judgment of Law a Writ of Error did lye in the Kings Bench of England, of an Erroneous Judgment in the Kings Bench in Ireland.

A Writ of Error lies not therefore to reverse a Judgment in Ireland by Special Act of Parliament, for it lies at Common Law to reverse Judgments in any Inferior Dominions; and if it did not, Inferior and Provincial Governments, as Ireland is, might make what Laws they pleas'd; for Judgments are Laws when not to be revers'd.

Pla. Parl. 21  
E. 1. f. 152. 57.

Magdolph appeal'd from the Court and Judgment of the King of Scots before King Edward the First, Ut Superiori Domino Scotiz.

And

And by the Case in 2 R. 3. f. 12. all the Judges there agree, <sup>2 R. 3. f. 12.</sup> assembled in the Exchequer Chamber, That a Writ of Error lay to reverse Judgments in Ireland, and that Ireland was subject as Calais, Gascoigne, and Guyen, who were theretofore subject as Ireland: And theretofore a Writ of Error would there lye as in Ireland.

Another Objection, subtle enough, is, That if naturalizing in Ireland, which makes a man as boyn there, shall not make him likewise as boyn (that is no Alien) in England, That then naturalizing in England should not make a man no Alien in Ireland (especially without naming Ireland) and the same may be said, That one denizen'd in England should not be so in Ireland. Obj. 3.

The Inference is not right in form, nor true. The Answer is, The people of England now do, and always did, consist of Native Persons, Naturaliz'd Persons, and Denizen'd Persons; and no people, of what consistence soever they be, can be Aliens to that they have conquer'd by Arms, or otherwise subjected to themselves, (for it is a contradiction to be a stranger to that which is a mans own, and against common reason and publique practise). Answ.

Theretofore neither Natives, or Persons Naturaliz'd or denizen'd of England, or their Successors, can ever be Aliens in Ireland, which they conquer'd and subjected. And though this is De Jure Belli & Gentium, observe what is said, and truly, by Sir Edward Coke in Calvin's Case, in pursuance of other things said concerning Ireland.

In the Conquest of a Christian Kingdom, as well those that served in Warr at the Conquest, as those that remain'd at home for the Safety and Peace of their Country, and other the Kings Subjects, as well Antenati as Postnati, are capable of Lands in the Kingdom or Country conquer'd, and may maintain any real Action, and have the like Priviledges there as they may have in England. 7. Rep. Calvin's C. f. 18. a.

Another Objection hath been, That if a person naturaliz'd in Ireland, and so the Kings natural Subject, shall be an Alien here; then if such person commit Treason beyond the Seas, where no local Liegeance is to the King, he cannot be tryed here for Treason, contra ligeantiz suæ debitum, by the Statute of 26 H. 8. or 35 H. 8. or any other Statute to that purpose. Obj. 4.

an Irish man in Ireland or elsewhere, may be tryed in England by those Statutes. 26 H. 8. c. 13.  
33 H. 8. c. 23.  
35 H. 8. c. 2.  
Treason by  
33 El. Ander.

sons Rep. f. 262. b. Orurks Case. Calvin's Case, f. 23. a.

1. To that I answer, That his Tryal must be as it would have been before those Laws made, or as if those stood now repeal'd.

2. His Tryal shall be in such case as the Tryal of a person naturalized in Scotland, after the Union, who is the Kings Subject, but an Alien in England.

### Ireland.

Though Ireland have its own Parliament, yet is it not absolute, & sui juris, for if it were, England had no power over it, and it were as free after Conquest and Subjection by England, as before.

That it is a conquer'd Kingdom, is not doubted, but admitted in Calvin's Case several times: And by an Act of Parliament of Ireland, appears in express words, Whereas in former times, after the Conquest of this Realm by his Majesties most Royal Progenitors, Kings of England, &c.

Stat. Hlb. 11,  
12. & 13 Jac.  
c. 5.

### What things the Parliament of Ireland cannot do.

1. It cannot Alien it self, or any part of it self, from being under the Dominion of England, nor change its Subjection.

2. It cannot make it self not subject to the Laws of, and subordinate to, the Parliament of England.

3. It cannot change the Law of having Judgments there given, revers'd for Error in England, and others might be named.

4. It cannot dispose the Crown of Ireland to the King of Englands second Son, or any other, but to the King of England.

Laws

## Laws made in the Parliament of *England* binding *Ireland*.

A Law concerning the Homage of Parceners, called Statutum 14 H. 3.  
Hiberniz.

A Statute at Nottingham, called Ordinatio pro Statu Hiber- 17 E. 1.  
niz.

Laws for *Ireland* made by E. 3. per advisamentum Concilii nostri in ultimo Parlamento nostro apud Westm. tento. Pat. Rol. 5 E. 3.  
pars 1. m. 89.  
pla. Parl. 586

An Act that no Arch-bishop, Bishop, or Prior should be chosen, who were Irish, nor come to Parliaments with Irish Attendants. 4 H. 3. c. 6.

The late Acts made in 17 Car. 1. and many others. 17 Car. 1.

The Resolution of all the Judges in the Exchequer Chamber, 25 H. 8. c. 20.  
That they were bound by, and subject to the Laws of England, as those of Calais, Gascoign, and Guien, in the Case of the Merchants of Waterford, for shipping Staple Goods for Sluce in Flanders, to which they pleaded the Kings Licence and Dispensation, not pretending freedom from the Statute of 2 H. 6. c. 4. whereupon they were questioned.

*Ireland* receiv'd the Laws of *England* by  
the Charters and Commands of H. 2.  
King John, H. 3. &c.

I know no Opinion that *Ireland* receiv'd the Laws of *England* by Act of Parliament of *England*, nor had it been to purpose, having also a Parliament of their own, that might change them.

Mr Edward Coke is of Opinion, That they received them by a Parliament of *Ireland*, in several Books, in the time of King John, and grounds his Opinion upon the words of several Patents of H. 3. which mention King John to have gone into *Ireland*, and carried with him discretos viros quorum communi

¶ ¶

Con-



Concilio & ad instantiam Hibernienſium, he appointed the Laws of England to be there observed.

Pat. 18 H. 3.

Another Patent of 18 H. 3. he there cites, wherein it is said, That King John, de communi omnium de Hibernia consensu, ordained the English Laws to be there observed: And the like in effect in 30 H. 3.

Cok. 4.<sup>1</sup> Inst. f. 349.

The same Charters he mentions, but not in the same words, especially that of 12 H. 3. 1. and to the same purpose that King John, by a Parliament in Ireland, established the Laws of England there, in his 4. Institutes.

That which occasioned the mistake were the words, De communi omnium assensu, in the Patents, which he conceiv'd to be a Parliament.

But the Original Act and Command of King John to this purpose, and the Charter of 12 H. 3. at large (whereof Sir Edward Coke had only short Notes) will clear how the English Law came into Ireland, and what that Communis assensus meant; for they were not received by Act of Parliament in those times.

## Tempore Regis Johannis.

Pat. 6. Johan. m. 6. n. 17.

Rex dat. potestatem Justic. suis *Hibernia*, quod brevia sua currant per totam terram nostram, & potestatem nostram *Hibernia* quæ ibidem nominantur.

Pat. 6. Johan.

*Johannes* Dei Gratia, &c. Justiciariis, Baronibus, Militibus, & omnibus fidelibus suis *Hibernia*, &c. Sciatis quod dedimus potestatem Justic. nostro *Hibern.* quod brevia sua currant per totam terram nostram, & potestatem nostram *Hibernia*, scilicet breve de Recto de feodo dimidii Militis & infra, & de morte antecessoris similiter de feod. Domini Milit. & infra. Et erit terminus de morte antecessor. post transfretationem *H.* Regis patris nostri de *Hibernia* in *Angl.* Et breve de Nova diss. cujus erit terminus post primam Coronationem apud *Cant.* Et breve de fugitivis & nativis in quo erit terminus post captionem *Dublin.* Et breve de

de divisis faciend. inter duas villas exceptis Baron. Et ideo vobis mandamus, & firmiter præcipimus, quod hæc ita fieri & firmiter tener. per totam potestatem nostram *Hibernia* faciatis. Teste meipso apud *Westmonasterium* secundo die *Novembris*. 17.

Claus. 7. Johannis.

Rex M. filio *Henr.* Justitiar. *Hibernia*, &c. Sciatis quod *Devenunt* exposuit nobis ex parte Regis *Connacia*, quod idem Rex exigit tenere de nobis tertiam partem terræ de *Connacia* per C. Marcas per Annum, sibi & hæredibus suis nomine Baroniz.

Pat. 6. Johan. m. 6. n. 17.

Rex, &c. Justic. Baronibus, Militibus, & omnibus fidelibus suis *Hibern.* &c. Sciatis quod dedimus potestatem Justic. nostro *Hibernia*, quod brevia sua currant per totam terram nostram, & potestatem nostram *Hibernia*, scilicet breve de Recto de feodo Dimidii Mil. & infra, & de morte Antecessor. & similiter de feod. dimid. Mil. & infra. Et erit terminus de morte Antecessor. post transfretationem *Henr.* Regis patris nostri de *Hibern.* in *Angl.* Et breve de Nova Disseisina cujus erit terminus post primam Coronationem nostram apud *Cant.* Et breve de Fugit. & Nativis, & ejus erit terminus post captionem *Dublin.* Et breve de divisis faciend. inter duas villas, except. Baron. Et ideo vobis Mandamus & firmiter præcipimus quod hæc ita fier. & firmiter teneri per totam potestatem nostram *Hibernia* faciatis. Teste meipso apud *Westmonast.* ij. die *Novembris*.

Claus. 12 H. 3. m. 8.

Rex dilecto & fideli suo *Richardo de Burgo* Justic. suo *Hibern.* salutem, Mandamus vobis firmiter Præcipientes quatenus certo die & loco faciatis venir. coram vobis Archiepiscopos, Episcopos, Abbates, Priores, Comites, & Barones, Milites & Libere tenentes & Ballivos singulorum Comitatum, & coram eis publice legi faciatis *Chartam Domini J.* Regis patris nostri cui Sigillum suum appensum est, quam fieri fecit & jurari à Magnatibus *Hibern.* de Legibus & consuetudinibus *Angl.* observandis in *Hibernia*. Et præcipiatis eis ex parte nostra quod Leges illas &

De legibus & consuetudinibus observandis in *Hibernia*.

Pat. 6. Joh. n. 17. Dat. apud *Westm.* 2 die *Novemb.*

Q q 1

con

conſuetudines in Charta præd. contentas de cetero firmiter teneant & obſervent. Et hoc idem per ſingulos comitatus *Hibern.* clamari faciatis & teneri prohibentes firmiter ex parte noſtra, & ſuper forisfacturam noſtram ne quis contra hoc mandatum noſtrum venire præſumat. Eo excepto quod nec de morte, nec de Catall. *Hibernienſium* occiſorum nihil ſtatuetur ex parte noſtra circa quindecim dies à die Sancti *Michaelis*, Anno Regni noſtri xij. ſuper quo reſpectum dedimus magnatibus noſtris *Hibernia* uſque ad terminum præd. Teſte meipſo apud *Weſtmonaſt.* 8. die *Maii*, Anno xij.

Patentes 30 H. 3. m. 1.

Quia pro communi utilitate terræ *Hibern.* & unitate terrarum Regis, Rex vult & de communi Conſilio Regis proviſum eſt, quod omnes Leges & conſuetudines quæ in Regno *Anglia* teneantur, in *Hibern.* teneantur & eadem terra eiſdem Legibus ſubjaceat, & per eaſdem regatur, ſicut Dominus *Johannes* Rex cum ultimo eſſet in *Hibernia* Statuit & fieri mandavit. Quia etiam Rex vult quod omnia brevia de Communi jure quæ currunt in *Angl.* ſimiliter currant *Hibernia* ſub novo Sigillo Regis.

Mandatum eſt Archiepiſcopis, &c. quod pro pace & tranquillitate ejusdem terræ per eaſdem Leges eos regi, & deduci permittant, & eas in omnibus ſequantur. In cujus, &c. T. R. apud *Wadeſtocks* ix die *Septembris*.

### Out of the Cloſe Rolls of King *Henry* the Third his Time.

Claufe 1 H. 3. dorſo, 14.

The Kings thanks to *G. de Marſſei*, Juſtice of *Ireland*. The King ſignifies that himſelf, and other his Lieges of *Ireland*, ſhould enjoy the Liberties which he had granted to his Lieges of *England*, and that he will grant and confirm the ſame to them.

Claufe

Claufe 3. H. 3. m. 8. part 2.

The King writes fingly to *Nicholas*, Son of *Leonard* Steward of *Meth*, and to *Nicholas de Verdenz*, and to *Walter Purcell* Steward of *Lagenia*, and to *Thomas* the fon of *Adam*, and to the King of *Connage*, and to *Richard de Burgh*, and to *J. Saint John* Treafurer, and to the other Barons of the *Exchequer* of *Dublin*, That they be intendant and answerable to *H. Lord* Arch-bifhop of *Dublin*, as to the Lord the King's Keeper and Bailiff of the Kingdome of *Ireland*, as the King had writ concerning the fame matter to *G. de Marifcu*, Juftice of *Ireland*.

Claufe 5. H. 3. m. 14.

The King writes to his Juftice of *Ireland*, That whereas there is but a fingle Juftice itinerant in *Ireland*, which is faid to be diffonant from the more approved cuftome in *England*, for Reafons there fpecified, two more Juftices fhould be affociated to him, the one a Knight, the other a Clerk, and to make their Circuits together, according to the Cuftome of the Kingdom of *England*. Witnefs, &c.

The Clofe Roll. 5 H. 3. m. 6. Dorfo.

The King makes a Recital, That though he had covenanted with *Geoffrey de Marifcu*, That all Fines, and other Profits of *Ireland*, fhould be paid unto the Treafure, and to other Bailiffs of the Kings *Exchequer* of *Dublin*, yet he receiv'd all in his own Chamber, and therefore is removed by the King from his Office: Whereupon the King, by advife of his Council of *England*, eftablifheth. that *H. Arch-bifhop* of *Ireland* be Keeper of that Land, till further order. And writes to *Thomas*, the fon of *Anthony*, to be answerable and intendant to him. After the fame manner it is written to fundry Irish Kings and Nobles there fpecially nominated.

Claufe



## Clause 7. H. 3. m. 9.

The King writes to the Arch-bishop of *Dublin*, his Justice of *Ireland*, to reverse a Judgment there given, in a Case concerning Lands in *Dalkera*, between *Geoffrey de Mariscu*, and *Eve* his wife Plaintiffs, and *Reignald Talbot* Tenant. By the Record of the same Plea returned into *England*, the Judgment is reversed upon these two Errors. The first, because upon *Reignald's* shewing the Charter of King *John*, the King's Father, concerning the same Land, in regard thereof desiring peace, it was denied him.

The second, Because the Seisin was adjudged to the said *Geoffrey* and *Eve*, because *Reynald* calling us to warranty, had us not to warranty at the day set him by the Court, which was a thing impossible for either *Geoffrey*, or the Court themselves to do, our Court not being above us to summon us, or compel us against our will. Therefore the King writes to the Justice of *Ireland* to re-seise *Reynald*, because he was disseised by Erroneous Judgment.

## Clause 28. H. 3. m. 7.

The King writes to *M. Donenald*, King of *Tirchaniill*, to aid him against the King of *Scots*, Witnesses, &c. The like Letters to other Kings and Nobles of *Ireland*.

## Clause 40. E. 3. m. 12. Dorso.

The King takes notice of an illegal proceeding to Judgment in *Ireland*, Ordered to send the Record and Process into *England*.

It was objected by one of my Brothers, That *Ireland* received not the Laws of *England* by Act of Parliament of *England*, but at the Common Law by King *John's* Charter. If his meaning be that the Fact was so, I agree it; but if he mean they could not receive them by Act of Parliament of *England* (as my Brother *Maynard* did conjecturally infer for his purpose) then I deny my Brothers Assertion; for doubtless they might have received them by Act of Parliament. And I must clear my Brother *Maynard* from any mention of an Union, as was discoursed of *England* and *Ireland*: Nor was it at all to his purpose.

If any Union, other than that of a Provincial Government under England had been, Ireland had made no Laws more than Wales; but England had made them for Ireland, as it doth for Wales.

### As for the Judgment,

One of my Brothers made a Question, Whether George Obj. Ramſey, the younger Brother, inheriting John Earl of Holdernes, beſore the naturalization of Nicholas, Whether Nicholas, as elder Brother, being naturalized, ſhould have it from him? Doubtleſs he ſhould, if his Naturalizing were good. He ſaith, the Plaintiff cannot have Judgment, becauſe a third perſon, by this Verdict, hath the Title.

If a Title appear for the King, the Court, ex Officio, ought to give Judgment for him; though no party. But if a man have a prior Poſſeſſion, and another enters upon him without Title, I conceive the priority of Poſſeſſion is a good Title againſt ſuch an Entry equally when a Title appears for a third, that is no party, as if no Title appear'd for a third. Anſw.

But who is this third party? For any thing appears in the Record, George Ramſey died beſore the Earl. 2. It appears not that his Son John, or the Defendant, his Grand-child, were born within the Kings Liegeance. Patient appears to be born at Kingſton, and ſo the Daughters of Robert by the Clerk.

The Acts of Ireland except all Land whereof Office was found beſore the Act to entitle the King, but that is in Ireland, for the Act extends not to England, If Nicholas have Title, it is by the Law of England, as a conſequent of Naturalization.

So it may be for the Act of 7 Jac. cap. 2. he that is Naturalized in England, ſince the Act, muſt receive the Sacrament; but if no Alien, by conſequent then he muſt no more receive the Sacrament than a Poſtnatus of Scotland.

Ireland is a diſtinct Kingdom from England, and therefore Obj. cannot make any Law Obligative to England.

That

Answ.

That is no adequate Reason, for by that Reason England being a distinct Kingdom, should make no Law to bind Ireland, which is not so: England can naturalize, if it please, nominally a person in Ireland, and not in England. But he recover'd by saying, That Ireland was subordinate to England, and therefore could not make a Law Obligatory to England. True; for every Law is coercive, and it is a contradiction that the Inferior, which is civilly the lesser power, should compel the Superior, which is greater power.

Secondly, He said England and Ireland were two distinct Kingdoms, and no otherwise united than because they had one Sovereign. Had this been said of Scotland and England, it had been right, for they are both absolute Kingdoms, and each of them Sui Juris.

But Ireland far otherwise; for it is a Dominion belonging to the Crown of England, and follows that it cannot be separate from it, but by Act of Parliament of England, no more than Wales, Gernsey, Jersey, Barwick, the English Plantations, all which are Dominions belonging to the Realm of England, though not within the Territorial Dominion or Realm of England, but follow it, and are a part of its Royalty.

Thirdly, That distinct Kingdoms cannot be united, but by mutual Acts of Parliament. True; if they be Kingdoms sui Juris, and independent upon each other; as England and Scotland cannot be united but by reciprocal Acts of Parliament. So upon the Peace made after Edward the Third's war with France, Gascoign, Guien, Calais were united and annexed to the Crown of England by the Parliaments of both Nations, which is a secret piece of Story, and mistaken by Sir Edward Coke, who took it as a part of the Conquest of France, and by no other Title.

But Wales, after the Conquest of it by Edward the First, was annexed to England, Jure Proprietatis, 12 Ed. 1. by the Statute of Ruthland only, and after more really by 27 H. 8. & 34. but at first received Laws from England, as Ireland did; but not proceeded by Writs out of the English Chancery, but had a Chancery of his own, as Ireland hath; was not bound by the Laws

Laws of England, unnamed until 27 H. 8. no more than Ireland  
now is.

Ireland in nothing differs from it, but in having a Parliament,  
Gratia Regis, ſubject to the Parliament of England, it might have  
had ſo, if the King pleaſ'd; but it was annexed to England. None  
doubts Ireland, as conquer'd, as it; and as much ſubject to the  
Parliament of England, if it pleaſe.

The Court was divided, viz. The Chief Juſtice and *Tyrell*  
for the Plaintiff. *Wylde* and *Archer* for the Deſen-  
dant.

R r

*Trin*



*Trin. 25 Car. II. C. B. Rot. 1488.*

*Thomas Hill and Sarab his Wife are Plaintiffs.  
Thomas Good Surrogat of Sir Timothy Baldwyn  
Knight, Doctor of Laws, and Official of the  
Reverend Father in God, Herbert Bishop of He-  
reford is Defendant, In a Prohibition.*

**T**HE Plaintiffs, who prosecute as well for the King, as themselves, set forth, That all Pleas and Civil Transactions, and the Exposition and Construction of all Statutes and all Penalties for the breach of them pertain only to the King and his Crown.

Then set forth the time of making the Act of 32 H. 8. c. 38. and the Act it self at large, and that thereby it was enacted, That from the time limited by the Act, no Reservation or Prohibition (Gods Law excepted) should trouble or impeach any marriage without the Levitical Degrees. And that no person shall be admitted after the time limited by the Act, in any the Spiritual Courts within this Kingdom, to any Process, Plea, or Allegation contrary to the Act.

They set forth, That after the making of the said Act, and the time thereby limited, the Plaintiffs being lawful persons to contract marriage, and not prohibited by Gods Law, and being persons without the Levitical Degrees, the Twentieth day of September, in the Four and twentieth year of the King, at Lemsster in the County of Hereford, contracted matrimony in the face of the Church, and the same consummated and solemnized, with carnal knowledge and fruit of Children, at Lemsster aforesaid.

That by reason thereof the said Marriage is good and lawful, and ought not to be null'd in Court Christian.

That

That notwithstanding, the Defendant, premisforum non ignarus, fraudulently intending to grieve and oppress the Plaintiffs, unduly draws them into question before him in the Court Christian for an unlawful marriage, as made within the Degrees prohibited by Gods Laws, and there also, cause & subdole libelling, and supposing, that whereas by the Laws and Canons Ecclesiastical of this Kingdom, it is ordained, That none should contract matrimony within the Degrees prohibited by Gods Law, and expressed in a certain Table set forth by Publique Authority, Anno 1563. and that all marriages, so contracted, should be esteemed incestuous and unlawful, and therefore should be dissolved, as void, from the beginning.

And also, That whereas by a certain Act of Parliament made and published in the Eight and twentieth year of King Henry the Eighth, It is enacted, That no person or persons, subject or residing within the Realm of England, or within the Kings Dominions, should marry within the Degrees recited in the said Act, upon any pretence whatsoever: And

That whereas the said Thomas Hill had taken to wife one Elizabeth Clark, and for several years cohabited with her, as man and wife, and had carnal knowledge of her.

He, the said Thomas, notwithstanding, after the death of the said Elizabeth, had married with, and took to wife the said Sarah, being the natural and lawful Sister of the said Elizabeth, against the form of the said last mentioned Statute, and them the said Thomas and Sarah had caus'd unjustly to appear before him in Court Christian, to Answer touching the Premises, although the said marriage be lawful, and according to Gods Law, and without the Levitical Degrees. And

That although the Plaintiffs have, for their discharge in the said Court Christian, pleaded the said first recited Act, yet the Defendant refuseth to admit the same, but proceeds against them, as for an incestuous marriage, against the form of the Statute.

And that notwithstanding he was served with the Kings Writ of Prohibition to desist in that behalf, in contempt of the King, and to the Plaintiffs damage of One hundred pounds.

The Defendant denies any prosecution of the Plaintiffs, contrary to the Kings Writ of Prohibition, and thereupon Issue is joyn'd, and demurrs upon the matter of the Declaration, and prays a Consultation, and the Plaintiffs joyn in Demurrer.

In the Argument upon Harrisons Case, I said, and still say, That if granting Prohibitions to the Spiritual Courts in Cases of Matrimony, were *res integra* now, I saw no reason why we should grant them in any Case. The matter being wholly of Ecclesiastick Conizance, my Reasons were and are

1. Because in all times some marriages were lawful, and others prohibited by Divine and Ecclesiastick Laws or Canons, yet the Temporal Courts could not prohibit the impeaching of any marriage, how lawful soever, nor take notice of it.

2. If by Act of Parliament anciently, all marriages not prohibited by Gods Law, or Canons of the Church, had been declared lawful, the Temporal Courts thereby had no power to prohibit the questioning of any marriage more than before, for it had said no more than what the Law was, and did say before such Act.

So had it been enacted, That all marriages should be lawful, not prohibited by the Levitical Law, the Church had retain'd the judging which were against the Levitical Law, as they did when the unlawfulness was not confin'd only to the Levitical Law.

And the Question now concerning what are the Levitical Degrees? (whereof we assume the Conizance) is but the same as the question would be concerning what marriages were prohibited in the Eighteenth of Leviticus.

For though such Acts of Parliaments had been, yet they had given no new Jurisdiction or Conizance in matrimonial matters to the Temporal Courts, but had been only directory to the Courts which had the Conizance; and if any Judgment had been given amiss in them, it was to be rectified by appeal, according to those Statutes, or by Commissions of Delegation.

But I then said, That since 32 H. 8. many Prohibitions have been granted to the Spiritual Courts concerning marriages without the Levitical Degrees in several Ages. And that therefore in a Case concerning the Extent of the Spiritual and Temporal Jurisdiction, and after so many Parliaments wherein no complaint hath been made, or certainly no redress given, it cannot be expected we should, against so many judicial Presidents, take upon us to alter the Law so long practis'd, specially after Harrisons Case, in which all the Judges were advised with.

There.

Therefore taking it for granted, That the Temporal Courts can prohibit the impeaching of marriages without the Levitical Degrees, by the Statute of 32 H. 8. (for before no Prohibition was ever granted in that kind: The Question is,

Whether the marriage of the Husband with his Wives Sister, after the Wives death, be such a marriage as by the Act of 32. the Temporal Courts may prohibit the impeaching or drawing it into question in the Spiritual Courts, in order to a Divorce or separation of the parties? And I conceive they cannot for these Reasons,

1. I affirm this marriage to be expressly prohibited within the Eighteenth of Leviticus, and then it must be within the Levitical Degrees.

2. If it were not so prohibited, yet it is not a marriage without the Levitical Degrees, but within them, and therefore no Prohibition will lye for impeaching it; for marriages not to be impeached must be without the Degrees, and for that some marriages within the Degrees may be lawful.

3. That if this marriage be without the Levitical Degrees, yet it is a marriage prohibited by Gods Law, and therefore to be impeached, notwithstanding the Statute of 32. whose words are, No marriage (Gods Law excepted) shall be impeached without the Levitical Degrees.

As to the first,

1. When a Law is given to any people, it is necessary that it be conceiv'd and publish'd in words which may be understood, for without that the Law cannot be obey'd; and a Law that cannot be obey'd, is no Law.

2. The meaning of words in any Law are to be known, either from their use and signification, according to common acceptance before the Law made, or from some Law or Institution declaring their signification.

3. The Interdicts of marriage and carnal knowledge in the Levitical Law were directed formally to the men, not to the women, who are interdicted but by consequent; for marriage and carnal knowledge being a reciprocal Act, and impossible to be done by one party, it follows that the woman being interdicted to the man, the man must also consequently be interdicted to the woman, for a man cannot marry a woman, and she not marry him.

The



4. The Reasons why the Interdict is ever formally to the man, are, 1. Because in the prohibited Act of uncovering the nakedness, the man properly is the primary Agent, and the woman but patient and consenting; for a woman can no more uncover the mans nakedness naturally, than she can ravish him. 2. The man, after marriage, hath the deduction of the woman, ad Domum & Thalamum, and all the civil power over her, and not she over him; but the womans consent to have her nakedness uncovered is forbid, and makes her consenting an equal offence with the mans; for by the Twentieth of Leviticus the man and woman offending in that kind were to dye, which had not been but that both were Transgressors.

Verf. 6.

5. The first and most expresse Law prohibiting the carnal knowledge of certain persons in the Eighteenth Chapter of Leviticus, is, — None of you shall approach to any that is near of kin to him, to uncover their nakedness.

6. Near of kin are words of relation, and have no positive certainty, nor are intelligible, but relatively to remoter kin; for all the posterity of Adam being of kin in some degree;

A person of kin to a man within two Degrees, is nearer of kin than one within four Degrees; and one within four Degrees nearer than one within eight Degrees; and so interminately.

Hence it follows, That the Law before cited, — Not to approach to any near of kin, to uncover their nakedness, had been useless, without knowing the persons accepted and accounted to be the near of kin.

Those persons were known to the Jews to whom the Law was given by the Law it self declaring them precisely.

Lev. 21. 1, 2.)

The words are — There shall none be defiled for the dead among his people, but for his kin that is near unto him; that is, for his mother, and for his father, and for his son, and for his daughter, and for his brother, and for his sister. And without this declaring Law, it is evident that these persons are a mans next of kin, in the ascending and descending, and in the collateral line. And they which are next of kin to him must be a mans near kin necessarily, although others more remote may be also denominated a mans near kin by custome of speech.

Upon this foundation all the Prohibitions concerning incestuous marriages, are grounded by the Eighteenth Chapter of Leviticus.

The

The first and moſt general Levitical prohibition in that kind, is in the ſame words as this Law, prohibiting being defiled for the dead, but for a mans kin, that is near unto him.

None of you ſhall approach to any that is near of kin to him, to uncover their nakedneſs. And after Inſtances are given of the perſons comprehended under thoſe words, Near of kin, as is done in the other Law concerning the dead.

As in the father, the brother, the ſon, whoſe nakedneſs appears to conſiſt and terminate in their Wives: For a man cannot otherwiſe uncover the nakedneſs of a man but in his wife, which is the mans nakedneſs, as appears in the Text; and thoſe are three of the perſons comprehended under the words near of kin.

The nakedneſs of thy father ſhalt thou not uncover, which is Lev. 18. v. 7. explained as beſore in the next verſe, — The nakedneſs of thy v. 8. Fathers wife ſhalt thou not uncover: It is thy Fathers nakedneſs,

Thou ſhalt not uncover the nakedneſs of thy daughter in law, ſhe v. 15. is thy ſons wife.

The nakedneſs of thy brother wife ſhalt thou not uncover; it is v. 16. thy brothers nakedneſs.

Which is the ſame as to ſay, Thy father, thy brother, thy ſon, are thy near of kin, therefore thou ſhalt not uncover their nakedneſs by uncovering the nakedneſs of their wives.

Then as to the nakedneſs of the females terminating in their own perſons.

The nakedneſs of thy mother ſhall thou not uncover, ſhe is thy v. 7. mother. — The nakedneſs of thy ſiſter, the daughter of thy v. 9. father, or the daughter of thy mother, thou ſhalt not uncover: which is to ſay, Thy mother and ſiſter are thy near of kin, therefore ſhalt thou not uncover their nakedneſs. So expreſs Inſtances are made in five of the ſix ſorts of perſons declared to be near of kin.

But no Inſtance is made in the daughter, though ſhe be as immediately as the ſon near of kin to the father, and eminent-ly comprehended under that Law of not approaching to a mans near of kin, and by all both reaſon and expoſition within it; which made Sir Edward Coke, by miſtake in his Table of Pro-Cok. Inſt. 2. f. 683.hibited Marriages in his Comment upon the Statute of 32 H. 8. to ſet down the daughter as nominally prohibited by the Eighteenth of Leviaeus, and then in the Margent to ſay, thoſe Degrees are truly

truly set down in the Statutes of 25 & 28 H. 8. whereas the daughter is mentioned in neither of them, nor in the Eighteenth of Leviticus.

The use I make of this, is to shew, That the extent of the prohibiting Law is not to be measured from the persons instanced in Leviticus; for should it be so estimated, the Law would be narrower than it self, the Instances comprehending only five prohibited persons: But the Clause of not approaching to a mans near of kin comprehending six, and so the Law would be inconsistent with it self.

§ The second General Law.

Besides those six Degrees of persons before mentioned, who are past question a mans next of kin, and consequently his near of kin, and declared by the Levitical Law so to be, there are other degrees of kin prohibited, which are also undoubtedly a mans next of kin after the former six kinds, and are denoted also in Leviticus as a mans near kin; and who are instanc'd in as, and indeed are, the next, and so the near of kin to a mans near of kin, as before, and prohibited for that reason, beyond which kindred no prohibition is found in Leviticus.

Whence a second general Law is deduced from Leviticus the Eighteenth, That no man shall discover their nakedness who are the near of kin to his near of kin, or of them who are propinqui propinquis suis, which they draw from these words,

Lev. 18. v. 12.

v. 13.

v. 14.

v. 15.

Thou shalt not uncover the nakedness of thy fathers sister, she is thy fathers near kinswoman. Nor of thy mothers sister, for she is thy mothers near kinswoman. Nor of thy fathers brother, which must be for the same reason, he being his fathers near kinsman. Nor of thy sons daughter, or of thy daughters daughter, for the like reason, they being near of kin to his son and daughter, as his son and daughter are to him.

All which are instanced in, in Leviticus, as prohibited for that reason, and many others are of the same relation not instanced in, as a mans mothers brother, his fathers father, his mothers father, his fathers mother, his mothers mother, his brothers daughter, his sisters daughter, and others who are equally near of kin to his near of kin, as his immediate near of kin are to himself, and were never doubted to be prohibited within the Levitical Degrees by any.

Whence

Whence also it appears, That the Instances given in this second Rule drawn out of Leviticus, are not the Law it self, nor comprehend the extent of it, but are examples only of another, of second degree of kindred, comprehended under the general Law of not approaching to those near of kin, and which are particularly specified by the Karait Rabbies.

That all persons near of kin strictly, to any the six persons first interdicted, are likewise interdicted by that Law, None shall approach to any near of kin to him to uncover their nakedness, within the meaning of the words, near of kin, is further proved by these Reasons :

1. When the Law hath denominated the Relations to be accounted near of kin ; (as is done in this case) none comprised under that denomination can be more or less near of kin than others so denominated. As when the Law denominates a man an Attorney, Serjeant, or the like, no Attorney is more or less an Attorney, and no Serjeant more or less a Serjeant, than any other Attorney or Serjeant. And so is it in all orders of men of the same denomination.

Therefore it appearing by the Law to be the reason of interdicting a person, because near of kin to a mans father or mother, and none of those six Relations being more or less near of kin than the other, the nearness of kin to any of them is as much reason of interdicting, as the nearness of kin to the father or mother, or any other of them instanced in.

Another reason is, because the Law forbidding the approach to any near of kin, forbids in that expression the near of kin to any of the six persons strictly denominated near of kin, as well as those six persons themselves: For in Leviticus a man is interdicted his wives daughter, and his wives sons daughter, and her daughters daughter, because they are his wives near kinswomen, whereas her daughter only is the near kinswoman to the wife in the strictest sense, and the other but near of kin to her near of kin, that is, to her daughter; yet all of them are said to be the wives near kinswomen. So, Thou shalt not uncover the nakedness of thy mothers or fathers sister, for he uncovereth his near kin: before they were said to be the near kin to the mother and father, and here to be the sons near kin.

Lev. 20. 19.



## The third General Law.

Lev. 18. 17.

The third prohibiting Rule drawn out of Leviticus, is, A man is prohibited to take a wife, and any other near of kin to her, which is grounded upon these words, Thou shalt not uncover the nakedness of a woman and her daughter; neither shalt thou take her sons daughter, or her daughters daughter, to uncover their nakedness, for they are her near kinswomen.

None of the wives near kinswomen are here clearly instanced in but her daughter, not her mother, not her sister, who are equally her near kinswomen, and comprised in this prohibition, and in the reason of it, as well as the daughter: For the reason of prohibiting these persons instanced in, being, 1. Because they are the wives near kinswoman, it is evident that the wives mother and the wives sister are by the same reason prohibited, for they are her near kinswomen in the strictest sense of nearness.

His wives daughter is literally forbidden the husband, and so is (but not so obviously) his wives mother. For example,

If he marry the mother, the words forbid him her daughter, and if he marry the daughter, he is prohibited the mother, else he would marry a woman and her daughter, which the words forbid, and accordingly by the Karais Doctrine, grounded upon clear exposition, as I conceive of the Levitical prohibitions, the husband is forbidden, as near of kin to his wife,

Her mother,  
 Her daughter,  
 Her sister.

And as the mother and daughter of his wife are expressly forbidden him in that Seventeenth verse, so is his wives sister in the next following Verse; Neither shalt thou take a wife to her sister to vex her, during her life. They add also, as prohibited the husband by this Rule,

His wives fathers wife,  
 Her brothers wife,  
 Her sons wife.

From

From the ſame Verſe they deduce a fourth Rule, That the Husband is prohibited the near of kin to his wives near of kin, as before in the prohibitions of conſanguinity; for he is literally prohibited the daughter of his wives ſon, and her daughters daughter, and by neceſſary inference alſo his wives grand-mother by father and mother, who are the near of kin to his wives daughter and her mother, who are his wives near of kin, which they thus ſtrongly prove.

For theſe Rules vid. Seldens ux. Ebraica, c. 4, 5.

A man is forbidden to take a woman and her ſons daughter, or her daughters daughter.

Therefore if a man marry his wives grand-mother, he hath taken a woman and her ſons daughter, or her daughters daughter, which is expreſly forbid.

And in theſe are expreſs inſtances given of prohibiting the near of kin to his wives near of kin, and are alſo termed his wives near kinſwomen, as well as thoſe which ſtrictly are ſo.

By the ſame reaſon all others near of kin to his wives father, brother, or ſiſter, are prohibited the husband, as well as thoſe near of kin to her mother, her daughter, or ſon, and are equally in terminis within the words, his wives near kinſwomen, of which ſort they number Sixteen, the ſame with thoſe prohibited in the ſecond Rule for Conſanguinity.

And it is obſervable, That the Parochial Matrimonial Table, in uſe in England, agrees in its prohibitions of marriages, which are Thirty in number, for Conſanguinity and Affinity, with the Levitical Prohibitions, according to the Doctrine of the Karait Rabbins in the four former Rules.

But the Karait prohibit Eleven Degrees of Affinity (much of the ſame nature) more than the Table doth in theſe two laſt Rules; that is,

The wives fathers wife,  
 Her brothers wife,  
 Her ſons wife,  
 Her Grand-fathers wife by the father  
 Her Grand-fathers wife by the mother,  
 Her fathers brothers wife,  
 Her mothers brothers wife  
 Her brothers ſons wife,  
 Her ſiſters ſons wife,  
 Her ſons ſons wife,  
 Her daughters ſons wife.

And they have Seven other Prohibitions by a fifth Rule, where of our Table receives none.

And this harmony between our Matrimonial Table and the Karaites exposition of the Levitical Degrees, is more perhaps than hath been observed, to justify the persons prohibited by the Table, for as many as they are, to be the same levitically prohibited.

Lev. 18. 18.

Seld. de Jure  
naturali &  
Gentium, l. 5.  
c. 10. §. 591.

To this may be added, That by our Vulgar Translation, and also by the Septuagint (as I conceive) the words, Neither shalt thou take a wife to her sister to vex her, to uncover her nakedness, besides the other, during her life, may be understood to prohibit the husband his wives sister absolutely, as well as to prohibit her during his wives life; For the words (during her life) may relate either to the words, Thou shalt not take a wife to her sister, viz. during her life, and in that sense the meaning will be, That a man is not prohibited to marry his wives sister absolutely, but only until his wives death, and is consonant to the exposition of that place in Leviticus, by the Scribes and Talmudical Rabbies.

Or the words may be read thus, Thou shalt not take a wife to her sister to vex her, during her life, or as long as she lives, that is, to cause jealousy and vexation to thy wife, during the whole time of her life; which sense and reading squares with the Doctrine of the Karaites upon Leviticus: and I think may well be defended by the Septuagint Translation.

The next thing I shall insist on, is, The Authority of the Canons of the Apostles so styled; Whether they were re vera the Apostles, or not, doubtless they are of great, both Antiquity and Authority.

Of those Canons the Eighteenth hath these words, as they are published in the Canon Law.

Can. Apost. 18

Qui duas sorores duxit aut consobrinam clericus esse non potest.

1. This Canon cannot be understood of having two Sisters for wives at the same time, for the Christians never admitted two wives, or more, at one time; and therefore interdicting of two sisters, qua sisters, at a time, was to no purpose.

2. The other part of the Canon, which is aut consobrinam, that is, his brother or sisters daughter taken to wife, shews the Canon respected only the nearness of Relation.

That

That clear'd, I reſon thus, either marrying the wiſes ſiſter, after the wiſes death, was lawful when the Canon was made, or unlawful, for it relates to an offence done, qui duxit, not to a new made offence. If lawful, why then was any puniſhment (namely excluſion from the Clergy) inflicted for a lawful Act? If it were unlawful in the Apoſtles time, how is it become now lawful?

It is true, as the Learned Grotius obſerves on this Subject, *Grot. de Jure Belli. l. 2. c. 5. Sect. 14.* A marriage may be unlawful in many reſpects, and yet the marriage ſtand good, and the vinculum matrimonii not diſſolv'd, but puniſhable ſome other ways, if made unlawful by Humane Authority.

But this Precept of the Apoſtles cannot be ſaid of Humane Authority only, nor a new Inſtitution, as is already noted; nor was there any Divorce for Inceſt among the Jews, as is noted after, but was always among the Chriſtians in Chriſtian States.

2. In that time the Apoſtles and Primitive Chriſtian Church had no Jurisdiction or Power of Legal Divorce, Separation, and Baſtarding the Iſſue, how inceſtuous ſoever the marriage were, for thoſe were Acts of Jurisdiction and Coercion, and could not be done but by the power of Laws, to which the parties were locally ſubject. But the Apoſtles and Church power was only to forbid them communion with the reſt of their brethren Chriſtians, and to deny the Offenders ſuch things as were in their power, namely, to be of the Clergy, as was done by this Canon.

This appears by St. Paul, 1 Cor. 5. It is reported there is fornication among you, and ſuch fornication as is not ſo much as named among the Gentiles, That one ſhould have his Fathers wife; which was an Inceſt of the higheſt degree, although denoted by the word *inceſtus*. *1 Cor. 5. 1.*

Yet St. Paul could do no more but direct the Corinthians from Communion with that man, and to put away from among them that wicked perſon: He could neither null his marriage, nor illegitimate his Iſſue, if he had any, nor put the Offender to death, according to the Moſaical Law, for theſe are effects of the Civil Power; and among the Hebrews no Divorce was for Inceſt, but the marriage was void, and the Inceſt puniſht, as in perſons unmarried.

*Seld. Ux. Ebraica, l. 1. c. 12. f. 87, 89.*

The



The next thing observable from this Canon, is, That the Rakers were of opinion that the marriage with the Consobrina, or brother or sisters daughter, was equally unlawful as marriage with two sisters, and the punishment by the Canon is equal.

Hence it follows, That the Rakers of the Canon, Apostles or others, did in those two Cases follow the exposition of the Karaites, and not of the Talmudists: The Karaites holding both marriages unlawful, but the Talmudists holding neither unlawful by Moses's Law.

But by what Law Divine the primitive and succeeding Christian Churches conceived themselves obliged (as generally they did, and do) in the matter of marriage, to observe the Levitical prohibitions strictly and indispensably, is a question of great difficulty: But surely they took their measures of those Prohibitions from the Doctrine of the Karaites, more than from the Scribes and Pharisees, though the last were of more Authority in the Hebrews Commonwealth, as appears by that of Matthew cap. 23. v. 2, 3. The Scribes and Pharisees sit in Moses his Seat, all therefore they bid you observe, that observe and do. Nor was it without reason done, for such of those degrees which are not particularly specified in the Eighteenth of Leviticus (for in those the Scribes and Karaites agree) but are deduc'd by Argument to be prohibited. The Karaites conclude in their Prohibitions of Marriage from the Scripture it self, but the Scribes in theirs from the Tradition and Sanctions of the Elders, which Traditions the Christians often heeded not, as introduced frequently against Gods Law, as appears in the Tradition of Corban against Gods Precept of honouring the Father and Mother, most signally.

Seld. Uxor Ebraica, l. 1. c. 3. 4.  
 Uxor Ebraica, l. 1. c. 1, 2.

Mark 7. 11.  
 Mat. 15. 3, 4, 5, 6.

Nor is it strange that the Opinions of private men prevail above the publick in process of time. So happened it in Luther, Calvin, and others, in the beginning of the Reformation, whose Opinions in time grew more authentique, both in Doctrine and Discipline here, and in many other States, than the Doctrine of the Church of Rome, which was the publique before in both kinds: Many like Examples might be given, ancient and modern, which I purposely omit.

By a Canon of another very ancient Provincial Council, called Concilium Eliberinum, under Pope Silveſter, Three hundred and fourteen years after Chriſt, and before the Council of Nice, by the Sixteenth Canon of that Council — Si quis poſt obitum Uxor ſuæ ſororem ejus duxerit per quinquennium à communione abſtineat. Gronl. 2. c. 5.  
p. 256. ſect. 14.

By this ſo ancient Council, marrying the wiſes ſiſter was accounted unlawful but for the ſame reaſons as before; they could puniſh it no otherwiſe than by wapes in the power of the Church, which was to hinder the Offender from Communion for five years.

And in this Council they followed the expoſition of the Karaits alſo concerning marriages, and not of the Talmadiſts; nor is it rational to conceive, that Canons then forbidding any ſort of marriage, proceeded from an Arbitrary power, aſſumed by thoſe who made them, as Law makers, to which they could no way pretend, but becauſe it was unlawful by the Principles and Perſuaſion of all Chriſtian Believers.

*Vide for theſe Rules Selden's Uxor Ebraica,*  
l. 1. cap. 4, 5.

By the firſt Rule is interdicted to a man his near of Kin	By the Matrimonial Table of England interdicted
---	---

The fathers wiſe	The fathers wiſe or Step-mother f. 11
The mother	The mother f. 10
The brothers wiſe	The brothers wiſe f. 18
The ſiſter	The ſiſter f. 16
The ſons wiſe	The ſons wiſe f. 15
The daughter	The daughter f. 13

By

By the second *Rule* is interdicted to a man  
 the *near of kin* to his *near of kin*.

The Grand-fathers wife by the father	The Grand fathers wife by the father	f.2
The Grand-fathers wife by the Mother	The Grand-fathers wife by the mother	f.2
The Grand-mother by the Father	The Grand-mother by the father	f.1
The Grand-mother by the mother	The Grand-mother by the mother	f.1
The fathers brothers wife	The fathers brothers wife	f.6
The fathers sister	The fathers sister	f.4
The mothers brothers wife	The mothers brothers wife	f.7
The mothers sister	The mothers sister	f.5
The brothers sons wife	The brothers sons wife	f.27
The brothers daughter	The brothers daughter	f.25
The sisters sons wife	The sisters sons wife	f.28
The sisters daughter	The sisters daughter	f.26
The sons sons wife	The sons sons wife	f.21
The sons daughter	The sons daughter	f.19
The daughters sons wife	The daughters sons wife	f.22
The daughters daughter	The daughters daughter	f.20

By the third *Rule* is interdicted to the  
 husband his *wives near of kin*.

From a woman and her fathers wife	Omitted.	
From a woman and her mother	From a woman and her mother	f.12
From a woman and her Brothers wife	Omitted.	
From a woman and her sister	A woman and her sister	f.17
From a woman and her sons wife	Omitted.	
From a woman and her daughter	A woman and her daughter	f.14

By

By the fourth *Rule* is interdicted to a man the  
*near of Kin* to his *wives near of Kin*.

A woman and her grand-mother by the mother	A woman and her grand-mother by the mother f.3
A woman and her grand-mother by the father	A woman and her grand-mother by the father f.3
A woman and her fathers brothers wife	O. A woman and her fathers bro- thers wife f.6
A woman and her mothers bro- thers wife	O. A woman and her mothers brothers wife
A woman and her brothers sons wife	Omitted.
A woman and her brothers daugh- ter	A woman and her brothers daugh- ter f.29
A woman and her sisters daugh- ter	A woman and her sisters daughter f.30
A woman and her sisters sons wife	Omitted.
A woman and her sons sons wife	Omitted.
A woman and her sons daugh- ter	A woman and her sons daughter f.23
A woman and her daughters sons wife	Omitted.
A woman and her daughters daughter	A woman and her daughters daughter f.24
A woman and her fathers ſiſter	A woman and her fathers ſiſter
A woman and her mothers ſiſter	A woman and her mothers ſiſter
A woman and her grand-fathers wife by the father	Omitted.
A woman and her grand-fathers wife by the mother	Omitted.

These laſt four Degrees are not mentioned under the fourth  
Rule by Mr. Selden, but referred to by the words, & reliquis quæ  
ſuperſunt ex iis quæ in regula ſecunda propinquorum ſunt pro-  
pinquæ; but the two firſt of theſe laſt four are ſoſbid in our  
Matrimonial Table, not the two laſt, as ſeveral others of the  
ſame



ſame kind ; ſoꝝ the husband is not ſoꝝbid by the Table the wiues of his wiues Grand-fathers, noꝝ her Fathers, noꝝ Brothers wiue, noꝝ ſons wiue, noꝝ her fathers brothers, noꝝ mothers brothers wiue, noꝝ her brothers ſons wiue, noꝝ ſiſters ſons wiue, noꝝ her ſons ſons wiue, noꝝ her daughters ſons wiue.

By the fifth Rule is interdicted that *two near of Kin* marry *two other near of Kin*.

- |  |    |
|--|----|
| A man and his father from a woman and her daughter       | O. |
| A man and his father from a woman and her ſons wiue      | O. |
| A man and his father from a woman and her brothers wiue  | O. |
| A man and his father from a woman and her ſiſter         | O. |
| A man and his brother from a woman and her brothers wiue | O. |
| A man and his brother from a woman and her daughter      | O. |
| A man and his brother from a woman and her ſons wiue     | O. |

None of thoſe comprized in this fifth Rule are prohibited by the Matrimonial Table, but all the perſons interdicted by the Doctrine of the Karaites oꝝ Scripture Rabbies, are alſo interdicted by the Matrimonial Table of England, excepting eleven perſons befoꝝe mentioned, not interdicted to the wiues husband by the Table, who are interdicted by the Karaites enumeration, but in this paper are marked with Ciphers, as to the Matrimonial Table, in the firſt four Rules of the Karaites Doctrine. So as all the perſons prohibited in thoſe firſt four Rules of the Karaites, being in number Four and forty, are alſo prohibited by the Matrimonial Table, which, together with Eleven perſons ciphered in the Table, as excepted, make up the like number of Four and forty, from which if you deduct Eleven, as excepted, there will remain Three and thirty, wherein the Table and the Karaites agree.

And whereas the enumeration of the prohibited marriages to a man are in the Table but Thirty, and by conſequence ſo many to the woman; ſoꝝ where the man is prohibited to marry the woman, the woman muſt reciprocally be prohibited to marry the man; the reaſon is, becauſe in the number of degrees in the

the Table, the Grand-fathers wife, the Grand-mother, and the wives Grand-mother, make but three degrees: But in the enumeration of the Karaites, the Grand-fathers wife by the father, the Grand-fathers wife by the mother, the Grand-mother by the father, and the Grand-mother by the mother, the wives Grand-mother by the father, and the wives Grand-mother by the mother, are ſeverally enumerated, and ſo make Six perſons, Three more than are enumerated in the Table, and ſo the Numbers agree.

## The ſecond Affertion.

And as to the ſecond Affertion, That admitting this marriage is not within the Levitical Prohibitions, yet the Temporal Courts cannot prohibit the impeaching or drawing it into queſtion by the Spiritual Court.

There is a great difference between marriage within the Levitical prohibitions, and marriage within the Levitical degrees, which commonly are taken to be the ſame. For marriage within the Levitical prohibitions was always unlawful to the Hebrews by Gods Law, that is, the Moſaick Law: But marriage within the Levitical degrees was not always unlawful; for marriage between perſons of the ſame nearneſs in Affinity or Conſanguinity, which only makes the degree, was in ſome caſe and circumſtance unlawful, in others lawful: So a marriage unlawful, and a marriage lawful, as the Circumſtance varied in the ſame degree, that is, the ſame nearneſs of Relation.

The Levitical degrees, qua ſuch, are ſet forth by no Act of Parliament; but marriages which fall within ſome of thoſe degrees, are ſaid to be marriages within the degrees prohibited by Gods Law, by 28 H. 8. c. 7. & 28 H. 8. c. 16.

Now is it ſaid in any Act of Parliament, That all marriages within the Levitical degrees are prohibited by Gods Law.

Sir Edward Coke in the firſt Edition, but not in the reſt, of his Littleton, hath, I confeſs, theſe words; By the Statute of 32 H. 8. it is declared, That all perſons be lawful, that is, may lawfully marry, that are not prohibited by Gods Law to marry, that is to ſay, that be not prohibited by the Levitical degrees. Cok. Litt. l. 235. a. Edit. 1.

By which he makes all Gods Law, by which any marriage is prohibited to be the Levitical degrees, which is not ſo; nor both he conſtare ſibi, for in his Comment upon the Statute of 32 H. 8. he ſaith expreſſly,

¶ t 2

That

That marriage made with a person pre-contracted, or with a person naturally impotent, could not have been impeached in order to a Divorce, by reason of the Statute of 32 H. 8. but because such marriages are against Gods Law. Yet they are not marriages within the Levitical degrees.

This marriage in question therefore, though by way of Admission not within the Levitical prohibitions, if it be within the Levitical degrees at all, and whether unlawful or lawful within them, and by what Law soever so unlawful or lawful, cannot be prohibited to be impeached by the Spiritual Courts, by the Statute of 32 H. 8.

For that Act prohibits the impeaching of marriages only which are absolutely without the Levitical degrees, leaving all other to the Spiritual Jurisdiction as before the Act of 32. How

The Levitical degrees are to be reckon'd by the persons whose carnal knowledge is forbidden a man in respect of Consanguinity or Affinity by the Law of Moses. As the carnal knowledge of the mother, the fathers wife, the sons wife, &c. in respect of Consanguinity of the wifes daughter, her daughters daughter, her mother, &c. in respect of Affinity. And it is plain, the wifes sister is prohibited in some respect of Affinity, by the words, Neither shalt thou take a wife to her sister, to vex her: Therefore her marriage with her sisters husband is a marriage within the Levitical degrees.

And agreed on all sides to be unlawful within the degrees, if during the wifes life; but doubted if unlawful after her death.

Next, it is certain the wifes husband was restrained from taking his wifes sister as he might take another woman, that is, either during his wifes life, or after: Therefore his marriage with her was within the Levitical degrees.

But it must be clearly without those degrees, if the impeachment of it may be prohibited by the Act of 32 H. 8.

This marriage permitted lawful by the Canon Law, where used. Decret. Greg. l. 4. Tit. de Divortis, c. 9.

If a man marry his brothers wife, none will deny that marriage to be within the Levitical degrees; yet in some case that marriage was lawful by the Mosaike Law, that is, if the deceased brother died issueless. But that will not hinder the impeachment of such a marriage by the Statute of 32 H. 8.

So if a man marry his fathers brothers wife, it is a marriage within the Levitical degrees. Yet if the fathers brother were by the half blood only of the mothers side, the Rabbies and Scribes held such marriage not unlawful by the Levitical Law, but by the Sanctions of the Elders. Many such cases may be found to prove a marriage may be lawful, though it be a marriage within the Levitical degrees: But none of those can therefore be prohibited to be impeached, for they are not marriages without the Levitical degrees, as the Statute requires.

Seld. Uxor Ebraica, l. 1 c. 2. f. 8.

Accordingly Sir Edward Coke commenting upon the Statute of 32 H. 8. in his second Institutes, sets forth a Scheme of the Levitical degrees, as necessary to the exposition of that Statute, and therein enumerates the marriage of the wives husband with her sister to be both within the Levitical degrees, and prohibited by the Eighteenth Chapter of Leviticus.

Cok. Inst. 2 f. 683.

One Man was sued before the High Commissioners, 33 Eliz. for marrying his wives sisters daughter, and a Prohibition was granted, as Moore Reports the Case, because the marriage was not prohibited by the Levitical Law, which was no Reason.

Mans Case, Moore's Rep. f. 907. a.

Crook reports the same Case, and that a prohibition was granted, but that a consultation was after granted, and that a sentence of Divorce was given.

Crook. 33 El; f. 228. Mans Case.

In reporting this Case of Mans, Justice Crook's words are, A Consultation was granted, because the Prohibition is not to be, if the marriage be not within the Levitical degrees.

Which is a great mistake; for if the marriage be within the Levitical degrees, no prohibition ought to issue; for it ought not to be but when the marriage is without the Levitical degrees.

Then he adds, But here the prohibition was general, and therefore not good; which is not intelligible, whatever he intended by it.

For by the Libel it must necessarily appear to the Court, That the marriage in question was either without the Levitical degrees, or within them.

If it were without the degrees, the Court did most unjustly to grant the Consultation, for it ought not to have been granted.

If the marriage were within the Levitical degrees, it had been unjust not to grant a Consultation.

But



But a Consultation was granted, therefore the Court conceived the marriage of the husband with his wives sisters daughter to be a marriage within the Levitical degrees, and not without them, though it be not specified in the Eighteenth of Leviticus to be prohibited.

Cok. Litt. E.  
dit. 1. f. 235. a.  
Peirsons Case  
not Parsons.

Sir Edward Coke, in the first Edition of his Littleton, saith, That one Peirson was sued in the Ecclesiastical Court for marrying his first wives sisters daughter against the Canon of the Church; and that the Court of Common Pleas, upon consideration taken of the Statute of 32 H. 8. granted a prohibition, because the marriage was not prohibited by the Levitical degrees. And these two Cases have been principally insisted on to prove no marriage is within the Levitical degrees, if the degree be not particularly mentioned in the Eighteenth of Leviticus. But upon occasion of Harrison's Case, lately adjudg'd in this Court, I made search for the Records of those two Cases, but no Record could be found of Man's Case; but by Crook a Consultation was granted in it.

Trin. 2 Jac.  
Rot. 1032.

By the Record of Pierſon's Case, which was in Trinity 2 Jac. it appears that in Hillary Term following a Consultation was granted, which Sir Edward Coke mentions not in his Littleton. And in the Second Edition of his Littleton, and all the subsequent Editions, that Case is omitted.

Hob. f. 181. a.  
Howard verſ.  
Bartler.  
Rennington's  
Case.

I find likewise in the Lord Hobarts Reports, That one Rennington was questioned by the High Commissioners for marrying his wives Niece, and was sentenced to Penance, and bound to abstain from her Company, but they were not divorced à vinculo Matrimonii, though there was cause, saith the Book, and therefore the wife had her Dower, nor was there any prohibition in the Case.

So as by all these Cases the marriage of the husband with his wives sisters daughter, is a marriage prohibited within the Levitical degrees, for nearness of kindred to the wife; Then of necessity the wives sisters marriage (who is nearer to the wife) with the wives husband must be prohibited à fortiori; So I conceive these three Cases full against the Plaintiff.

It is not strange, That at first Prohibitions were granted upon the Statute of 32. in Cases which were not specifically mentioned in the Eighteenth of Leviticus, but after discussions of the Levitical degrees upon Consultations pray'd, It was manifestly found, That divers marriages must be prohibited within the Levitical degrees, not nominally expressed in the Eighteenth of

Leviticus; As the marriage of the father with his own daughter, Of the Grandſon with his Grand-mother or Grand-fathers wife, Of the Son with his Mothers brothers wife, Of the Uncle with his brothers or ſiſters daughter, which ſince appears by Sir Edward Coke to be a prohibited marriage, and others upon like reaſon. Cok. Inſt. 2. l. 683, 684.

And was reſolved in Arch-biſhop Laud's time, in the Caſe of Sir Giles Alington, who was deeply fined, and a Sentence of Divorce given for marrying his brother or ſiſters daughter, which I heard at Lambeth Houſe.

And no prohibition was granted, though moved for, as was very probable, and commonly repoſted; but we find no Record of Prohibitions denied, for there is no Entry made of Motions not granted, but of Prohibitions granted there is, which makes the granting of a Prohibition of no great Authority, unleſs upon Action brought a Conſultation be denied upon Demurrer.

So of the husband with his wives ſiſters daughter.

### The third Aſſertion.

As to the third Aſſertion, That admitting this marriage be without the Levitical degrees, yet it is prohibited by Gods Law, and therefore to be impeached notwithstanding the Statute of 32 H. 8. whole words are, No marriage, Gods Law excepted, ſhall be impeached without the Levitical degrees.

When an Act of Parliament declares a marriage to be againſt Gods Law, it muſt be admitted in all Courts and Proceedings of this Kingdom to be ſo.

By an Act, 25 H. 8. c. 22. intituled, An Act declaring the Eſtabliſhment of the Succeſſion of the Kings moſt Royal Maſteſty in the Imperial Crown of this Realm.

Among ſundry marriages declared by that Act to be marriages within the degrees of marriage prohibited by Gods Law, the marriage of a man with his wives ſiſter is expreſſly declared to be prohibited by Gods Law, and that a Divorce ſhould be of ſuch marriage, if any ſuch were.

But this Act is expreſſly repeal'd by an Act in 28 H. 8. c. 7. intituled, An Act for the Eſtabliſhment of the Imperial Crown of this Realm.

By

By that Act of 28 H. 8. it is declared in theſe words, And furthermore, ſince many Inconveniencies have fallen, as well in this Realm as others, by reaſon of the marrying within the degrees of marriage prohibited by Gods Law. That is to ſay, The Son to marry the Mother or the Step-mother, carnally known by his Father, The Brother the Siſter, The Father his Sons daughter, or his Daughters daughter, Or the Son to marry the Daughter of his Father, procreat and born by his Step-mother, Or the Son to marry his Aunt, being his Fathers or Mothers ſiſter, Or to marry his Uncles wife, carnally known by his Uncle, Or the Father to marry his Sons wife, carnally known by his Son, Or the Brother to marry his Brothers wife, carnally known by his Brother, Or any man married, and carnally knowing his wife, to marry his Wives daughter, or his Wives ſons daughter, Or his Wives daughters daughter, Or his Wives ſiſter.

Then it declares, Thoſe marriages to be indiſpenſable, becauſe againſt Gods Law, and that there ſhould be a ſeparation of ſuch marriages, if any were, and the Children procreat in them to be illegitimate.

But this Clause alſo of this Act of 28 H. 8. as ſome conceive, is repeal'd by 1 & 2 Phil. & Mar. c. 8. in theſe words, And alſo all that part of the Act made in the ſaid 28 H. 8. intituled, An Act for the Eſtabliſhment of the Succeſſion of the Imperial Crown of the Realm, that concerneth a Prohibition to marry within the degrees expreſſed in the ſaid Act, ſhall henceforth be repeal'd, made fruſtrate, void, and of none effect.

By the Act of 1 & 2 Phil. & Mar. two other Laws are likewiſe repeal'd, which concern the queſtion before us, viz. An Act in 28 H. 8. c. 16. intituled, An Act for the releaſe of ſuch as have obtained pretended Licences and Diſpenſations from the See of Rome: And the Act of 32 H. 8. c. 38. which hath been often mentioned.

But theſe two laſt Acts are revived by the Act of 1 Eliz. c. 1. and in force; but neither the Act of 25 H. 8. nor 28 H. 8. c. 7. are revived in expreſs terms: And not only ſo, but the Act of 1 El. c. 1. hath this Negative Clause, That all other Laws and Statutes, and the Branches and Clauſes of any Act or Statute repeal'd by the ſaid Act of Repeal made in the time of the ſaid late King Philip and Queen Mary, and not in this preſent Act ſpecially mentioned and revived, ſhall ſtand, remain, and be repeal'd and void in ſuch like manner and form as they were before the making of this Act.

Whence

Whence it follows, That this marriage is not now proved to be againſt Gods Law, by either of theſe repeal'd Statutes of 25 H. 8. or 28 H. 8. c. 7. unleſs it be made out, that one of them at leaſt remains at this day in force. And as for that,

The Act of 28 H. 8. c. 16. which makes void all Diſpenſations from the See of Rome, and expreſly revived by 1 Eliz. and all Branches, Words, and Sentences thereof, hath theſe words, As a Grace of the Kings to divers of his Subjects, who had married by Diſpenſation, notwithstanding that Act made all Diſpenſations from Rome void.

All marriages had from the Third of November, 26 H. 8. for which no Divorce or Separation is had, and which marriages be not prohibited by Gods Laws, limited and declared in the Act made this preſent Parliament for Eſtabliſhing the Kings Succeſſion, or otherwiſe, by Holy Scriptures, ſhall be good. By which words I conceive the Clause of 28 H. 8. c. 7. repeal'd in Queen Maries time, is again revived.

It may be objected, The Clause of 28 H. 8. c. 7. concerning Obj. marriages prohibited by Gods Law, continues ſtill repeal'd, be-  
cause it is not ſpecially mentioned to be revived by the Act of 1 Eliz. And therefore no Act is in force declaring the husbands marriage with his wives ſiſter to be prohibited by Gods Law.

An Act repeal'd is of no effect more than if it had been never made. Anſw.

By the Act of 28 H. 8. c. 7. All marriages prohibited by Gods Law, limited and declared by the Clause of that Act, were unlawful, notwithstanding any Diſpenſation had before the Repeal of that Clause.

By the Reviver in 1 Eliz. of 28 H. 8. c. 16. and of every Clause in it, All marriages prohibited by Gods Law, limited and declared by 28 H. 8. c. 7. were again unlawful, as before the Repeal, notwithstanding any Diſpenſation.

Therefore the Statute of 28 H. 8. c. 7. was revived by the Reviver of the Statute of 28 H. 8. c. 16. in 1 Eliz. and made as effectual as before it was repeal'd, and ſo it continues.

If it had been enacted by Parliament after the Repeal of the Clause in 28 H. 8. c. 7. That all marriages prohibited by Gods Law, limited and declared by 28 H. 8. c. 7. ſhould be unlawful, notwithstanding any Diſpenſation that enacting had revived the Clause in 28 H. 8. c. 7.



Therefore the ſame thing being enacted by revival of 28 H. 8. c. 16. muſt have the ſame effect of reviving that Clause in 28 H. 8. c. 7.

I will put it, for more clearneſs, by way of a Caſe; A man before the Third of November, 26 H. 8. by Diſpenſation from Rome, had married his wifes ſifters daughter, which marriage was prohibited by the Canons of the Church, and no Divorce had been attempted in the Caſe until after 1 Eliz. and the Reviver of the Statute of 28 H. 8. c. 16. which made void all Diſpenſations from Rome.

It is plain, That this marriage being not prohibited by Gods Law, limited and declared in the Act of 28 H. 8. c. 7: was by the expreſs words of the revived Act of 28 H. 8. c. 16. a marriage to continue good without ſeparation, notwithstanding all Diſpenſations from Rome were null'd; becauſe it was no marriage excepted out of the Grace intended and given by that Act to the Kings Subjects married by Diſpenſation before November the Third, 26 H. 8. and not then ſeparated.

But if a marriage before the Third of November, 26 H. 8. had been by Diſpenſation between the brother and ſiſter, or as this Caſe is between the husband and his wifes ſiſter, and no ſeparation attempted until after 1 Eliz. and the Reviver of the Act of 28 H. 8. c. 16. Theſe marriages were not to continue good, and without ſeparation by 28 H. 8. c. 16. becauſe they were marriages particularly excepted out of the Grace granted by that Act, as being prohibited by Gods Law, limited and declared in the Act of 28 H. 8. c. 7. which proves 28 H. 8. c. 7. to be in force by the Reviver of 28 H. 8. c. 16. and conſequently the marriage in queſtion to be clearly againſt Gods Law, which is the thing to be proved.

In the Statute of 28 H. 8. c. 7. there are two Clauſes concerning marriages, The firſt declaring certain marriages there recited, to be within the degrees prohibited by Gods Law, which Clause concerns the preſent queſtion, and is before cited.

The ſecond Clause, in theſe words, Be it therefore enacted, That no perſon or perſons, Subjects or Reſiants of this Realm, or in any your Dominions, of what eſtate, degree, or degrees ſoever they be, ſhall from henceforth marry within the degrees afore rehearſed, what pretence ſoever ſhall be made to the contrary thereof. Then it proceeds,

That

That if there were any Divorce or Separation made of any ſuch marriages by the Arch-biſhops or Miniſters of the Church of *England*, ſuch Separation ſhould remain good, and not be revokable by any Authority; and the Children procreated under ſuch unlawful marriage, ſhould be illegitimate.

And if any ſuch marriages were in any the Kings Dominions without Separation, that there ſhould be a ſeparation from the Bonds of ſuch unlawful marriage.

Now we muſt obſerve, the Act of 1 & 2 Phil. & Mar. c. 8. doth not repeal this Act entirely of 28 H. 8. c. 7. but repeals only one Clause of it; the words of which Clause of Repeal are beſore cited, and manifeſt this ſecond Clause of the Act of 28 H. 8. and not the firſt to be the Clause intended to be repealed.

For there was no reaſon to repeal the Clause declaratory of marriages prohibited by Gods Law, which the Church of Rome always acknowledged; nor do the words of Repeal import any thing concerning marriages within degrees prohibited by Gods Law.

But (as the time then was) there was reaſon to repeal a Clause enacting all Separations of ſuch marriages with which the Pope had diſpenc'd, ſhould remain good againſt his Authority; and that ſuch marriages with which he had diſpenc'd, not yet ſeparated, ſhould be ſeparate.

And the words of the Clause of Repeal manifeſt the ſecond Clause to be intended, viz. All that part of the Act made in the ſaid Eight and twentieth year of King *Henry* the Eighth, which concerneth a prohibition to marry within the degrees expreſſed in the ſaid Act, ſhall be repealed, &c.

As it is true, That if a marriage be declared by Act of Parliament to be againſt Gods Law, we muſt admit it to be ſo; for by a Law (that is, by an Act of Parliament) it is ſo declared.

By the ſame reaſon, if by a lawful Canon, a marriage be declared to be againſt Gods Law, we muſt admit it to be ſo; for a lawful Canon is the Law of the Kingdom, as well as an Act of Parliament: And whatever is the Law of the Kingdom, is as much the Law as any thing elſe that is ſo; for what is Law both not ſuſcipere magis aut minus.

But by a lawful Canon of this Kingdom, which is enough, and not only ſo, but by a Canon warranted by Act of Parliament, the marriage in queſtion is declared to be prohibited by Gods Law, therefore we muſt admit it to be ſo.

In a Synod or Convocation holden at London in the year 1603. for the Province of Canterbury, by the Kings Writ, and with the Kings Licence under the Great Seal of England, to treat, consult, and agree of such Canons and Constitutions Ecclesiastick as should be there thought fit. Several Canons were concluded and agreed

To which King James gave his Royal Assent and Approbation, and by his Letters Patents ratified and confirmed them, according to the form of the Statute made in 25 H. 8. c. 19. and commanded the due observance of them. Among which the Ninety ninth Canon is,

No person shall marry within the degrees prohibited by Gods Law, and expressed in a Table set forth by Authority in the year of our Lord 1563. and all marriages so made and contracted, shall be adjudged incestuous and unlawful; and the aforesaid Table shall be in every Church publickly set up and fixed at the charge of the Parish.

Which is the same as ——— No person shall marry within the degrees prohibited by Gods Law, and which degrees are expressed in the Table, &c.

For to the Question, What is expressed in the Table? there can be no Answer, but the degrees prohibited by Gods Law.

But by this Table, this marriage in question is expressed to be in a degree prohibited by Gods Law, therefore it must be admitted to be so.

Another consequent is this, That by this Canon, and consequently by the Law of this Kingdom, All marriages prohibited by that Table, are declared to be within the degrees prohibited by Gods Law.

Note, That any marriage unlawful by holy Scripture, is declared here to be against Gods Law judicially, no otherwise, than because by the Law of the Land the Scripture it self is declared and approved to be the Law of God; for the Scripture cannot judge it self to be Scripture without some Judicature.

— Therefore by the sixth Canon, tempore Ed. 6. at a Convocation in London, Anno 1552. the Authority of the Old Testament was declared. At a Convocation of both Provinces in London, Anno 1562. the Canonical and Apocryphal Books of the Old Testament were particularly enumerated, and the Books of the New declared Canonical, as Receiv'd. By the seventh Canon the Authority of the Old Testament Declared.

Can. 1552.

Can. 1562.

By the Act it is said, That the Clergy of this Kingdom, nor any of them, shall henceforth enact, promulgate, or execute any Canons, Constitutions, or Ordinances Provincial, by whatsoever name or names they may be called, in their Convocations, in time coming, which shall always be assembled by Authority of the Kings Writ, unless the same Clergy may have the Kings most Royal Assent and Licence to make, promulge, and execute such Canons, Constitutions, and Ordinances Provincial, &c.

The Chief Justice delivered the Resolution of the Court;  
And accordingly a Consultation was granted.

*In*



*In Camera Scaccarii.**Edward Thomas* Plaintiff.*Thomas Sorrell* Defendant.

**T**H E Plaintiff by Information in the Kings Bench, tam pro Domino Rege quam pro seipso, demands of the Defendant Four hundred and fifty pounds for selling Wine in the Parish of Stepney, in the County of Middlesex, by Retail, Ninety several times, between the Tenth day of June, the Seventeenth of the King, and the Two and twentieth day of May, the Eighteenth of the King, to several persons, without licence, contrary to the Statute of 12 Car. 2. whereby he forfeited Five pounds for every several offence, which amounts to Four hundred and fifty pounds.

The Defendant pleads, Nil debet, and therefore puts himself upon the Country. The Jury find,

That as to all the Debt, except Fifty pounds, the Defendant owes nothing. And as to the Fifty pounds, they find the Statute of 7 E. 6.c.5. concerning retailing of Wines, prout in the Statute.

They find Letters Patents under the Great Seal, dated 2 Febr. 9 Jac. prout in the Letters Patents, whereby King James incorporated the Company of *Vintners* in the City of London, by the Name of Master, Warden, Freemen, and Commonalty of the Mystery of *Vintners* in the said City, and thereby among other things granted, for him, his Heirs and Successors, to the said Master, Warden, and Freemen of the said Company, and their Successors, that they might always after, within the said City and Suburbs of the same, and within three Miles from the Walls or Gates thereof, and in all and every other City and Sea-ports, called Port-towns, within the Kingdom of England, and in all other Cities and Towns, known by the name of Thorough-fare-towns, where Posts were set and laid between *Dover* and *London*, and between *London* and *Barnwick*, where any of the Freemen of the said Mystery did, or should happen to dwell and keep a Wine Tavern, and by themselves or servants, sell Wine by retail or in gross to their best advantage, in their houses, or elsewhere, Non obstante the Statute of 7 E. 6.

They

They find the Act of 12 Car. 2. c. 25. and the confirmation of it concerning the giving Licences to retail Wine, and the Proviso therein prout.

Provided also, That this Act, or any thing therein contained, shall not extend, or be prejudicial to the Master, Wardens, Freemen, and Commonalty of the Mystery of *Vintners* of the City of *London*, or to any other City or Town Corporate, but that they may use and enjoy such Liberties and Priviledges, as heretofore they have lawfully used and enjoyed.

They find, That the Master, Wardens, Freemen, and Commonalty of the Mystery of *Vintners* in the City of *London*, was an ancient Corporation of the said City of *London*, at the time of the Act of 12 Car. 2. and incorporated by the Name of Master, Wardens, Freemen, and Commonalty of the Mystery of *Vintners* of the City of *London*.

They find, That the Defendant, three years before, and during all the time in the Information, used the Trade of retailing of Wine, and kept a Tavern in the Parish of *Stepney* in the County of *Middlesex*, was an Inhabitant there, and that the Defendants house, in which the said Wine was sold, is within two miles of the City of *London*.

They find, That the Defendant, within the time in the Information mentioned, did sell Ten pints of Sack, as in the Information mentioned, to be drunk and spent in his said dwelling house, being a Tavern, in the said Parish of *Stepney*.

They find, That at the time of the sale of the said Wine, and three years before, the Defendant was a natural born Subject of the King; and a Freeman of the City of *London* of the said Company of *Vintners*.

Si pro quer. quoad 50 l. pro quer.  
Si pro Def. pro Def. 1 s.

Upon this Special Verdict three Questions have been raised.

1. Whether the Patent of 9 Jac. was not void in its Creation?
2. Admitting it was not void in its Creation, Whether it became void by the death of King James.

3. It

3. If it were a good Patent in the Creation, nor was void by the death of King James, Whether the Proviso in the Act of 12 Car. 2. Saving all the Right of the Master, Wardens, Freemen and Commonalty of *Vintners* in the City of *London*, hath preserved all that Right which they had by the Patent of 9 Jac. against the Act of 12 Car. 2?

1. I conceive, That if the Patent, 9 Jac. were not void in the Creation, it remained good after the death of King James.

2. If it were not void in the Creation, nor by the death of King James, all Right that the Master, Wardens, Freemen and Commonalty of *Vintners* had by it, is still preserved by the Proviso in the Act of 12 Car. 2. but if the Patent of 9 Jac. was void in its Creation, or by the death of King James, then the Proviso in the Act of 12 Car. 2. aids them not at all.

So as now it is only insisted on, That the Patent of 9 Jac. was void in its Creation, for two Reasons.

1. For that the Law of 7 E. 6. was such a Law, pro bono publico, as the King could not dispence against it, more than with some other penal Laws, pro bono publico.

2. If he could to particular persons, he could not to the Corporation of *Vintners*, and their Successors, whose number of persons the King could never know; and that it stood not with the trust reposed in him by the Law, to dispence so generally without any prospect of number of persons.

The Books have been plentifully urg'd at the Barr, and by my Brothers, who argued before me, therefore I shall not Adum-agere to repeat them.

But I observed not that any steddie Rule hath been drawn from the Cases cited to guide a mans Judgment, where the King may, or may not dispence in penal Laws, excepting that old Rule taken from the Case of 11 H. 7.

11 H. 7. f. 11,  
12.

That with *Malum prohibitum* by Stat. the King may dispence, but not with *Malum per se*.

But I think that Rule hath more confounded mens Judgments on that subject, than realised them.

Yet I conceive that Case, and the Instances given in it, rightly understood, to be the best key afforded by our Books, to open this dark Learning (as it seems to me) of Dispensations, to which therefore I shall only or principally apply my self.

Be.

Before I enter upon it, I muſt prebiously aſſent, That every act a man is naturally enabled to do, is in it ſelf equally good, as any other act he is ſo enabled to do. And ſo all the Schoolmen agree, That *Actus quæ actus non eſt malus*. And that mens acts are good or bad only as they are precepted or prohibited by a Law, according to that Truth, Where there is no law there is no tranſgreſſion. Whence it follows, That every Malum is in truth a Malum prohibitum by ſome Law. Rom. 4.15.

In the next place, I mean by the word (Dispensation) when I uſe it, another thing than ſome of my Brothers defined it to be, namely, That it was *Liberatio à pœna*; or as others, That it is *provida relaxatio Juris*, which is defining an ignotum per ignotius, but *liberare à pœna*, is the proper effect of a pardon, not of a diſpenſation; For a diſpenſation obtained doth *juſ dare*, and makes the thing prohibited lawful to be done by him who hath it, upon which depends the true reaſon of many Caſes which admit not of diſpenſation; but a pardon frees from the puniſhment due for a thing unlawfully done. Yet freedom from puniſhment is a conſequent of a diſpenſation, though not its effect. But ſo it is alſo a conſequent of repealing the Law, and a conſequent of an exception at the making of the Law of ſome particular perſon or perſons from being bound by the Law.

I come now to the Caſe it ſelf of 11 H. 7. wherein I agree, That with Malum prohibitum by Stat. indefinitely underſtood the King may diſpenſe.

But I deny that the King can diſpenſe with every Malum prohibitum by Statute, though prohibited by Statute only.

1. The King may pardon Nuſances that are tranſient, and not continuing, as a Nuſance in the High-way, which ſtill continues, and is not ended, until removed; cannot be pardon'd: So of a Water-courſe diſberted, or a Bridge broken down, they cannot be pardon'd ſo as to acquit the Nuſance-maker for committing them; but the fine or puniſhment impoſ'd for the doing may be pardon'd. Cok. Pla. Coꝝ  
ron. f. 237.

But breaking the Aſſiſe of Bread and Ale, foreſtalling the Markets, ingroſſing, regrating, or the like, which continue not, but which are over aſſoon as done, until done de novo again, may be pardon'd, like other offences: So as the Offender ſhall not be impleaded for them, otherwiſe than by perſons who have receiv'd particular damage, which the King cannot remit; this difference holds in offences by penal Laws.



22 Car.2. c.8.

So a Mayor or Bayliff of a Town, or other Toll-taker, who is penally bound to provide true Market measures, and doth not, cannot be pardon'd by the King, because the Fault still continues; but the punishment inflicted the King may pardon. But by a Law all these offences may be pardon'd.

So it is generally true, that *malum per se* cannot be dispensed with; but thence to infer (as many do) that every *malum* which the King cannot dispense with is *malum per se*, is not true.

Now is there in that Case any sufficient designation of what is *malum per se*, and why to prevent error in disquisition concerning it, though some instances thereof, *mala per se*, be very right.

I shall therefore endeavour to instance in several kinds of *mala per se*, which cannot be dispens'd with, and in some *mala prohibita* by Acts of Parliament, and otherwise, which the King also cannot dispense with; and to give the reason why he cannot in both, thereby to make the conclusion I give at less confused, which is to differ penal Laws dispensable from those which are not.

Murther, Adultery, Stealing, Incest, Sacrilege, Extortion, Perjury, Trespasse, and many other of the like kind, all men will agree to be *mala per se*, and indispensable: All which are prohibited, and by Statutes. Now is it much to say, those are also prohibited by the Common Law, and therefore cannot be dispens'd with, if that were the reason, nothing prohibited at the Common Law could be dispens'd with, which is not so.

2. Where the Suit is only the Kings for breach of a Law, which is not to the particular damage of any third person, the King may dispense; but where the Suit is only the Kings, but for the benefit and safety of a third person, and the King is intitled to the Suit by the prosecution and complaint of such third person, the King cannot release, discharge, or dispense with the Suit, but by consent and agreement of the party concern'd. As where, upon complaint of any person, a man hath entred into Recognizance to keep the Peace against such person, the King cannot discharge such Recognizance before it be forfeited; but the party whose safety is concerned may, though the King only can sue the Recognizance. Some more such Cases may be.

As the Laws of Nufances are pro bono publico, so are all general penal Laws; and if a Nufance cannot be dispens'd with for that reason, it follows, no penal Law, for the same reason, can be dispens'd with.

Therefore the reason is, because the parties particularly damaged by a Nufance, have their Actions on the Case for their damage, whereof the King cannot deprive them by his dispensation: And by the same reason, other penal Laws, the breach of which are to mens particular damage, cannot be dispens'd with.

3. Nufances and Ills prohibited by penal Acts of Parliament, are of the same nature as to the publique, although (as the Law is now receiv'd) the mala or nocumenta prohibited by Acts of Parliament, are not presentable in Leets, or the Sheriffs Court, as Nufances at Common Law are, of which some questionless cannot be dispens'd with; As obstructing the High way, diverting a Water-course, breaking down a Bridge, breaking the Mill of Bread and Ale: for as to these, the parties particularly damaged by them have their Actions, which the King cannot discharge.

4 E. 4. f. 31.  
22 E. 4. f. 22.  
3 H. 7. f. 1.  
Br. Leet. n. 2.  
19, 25, 26, 30.

4. Other ancient Nufances are by which no man hath a particular damage or action for it, as if a man buy provision coming to the Market by the way (which is a Nufance by forestalling the Market) and sells it not in the Market forestall'd, no Action lies for a particular damage to any man, more than to every man; but the King may punish it.

So if a man buy Corn growing in the field, contrary to the Statute of 5 E. 6. c. 14. he is an Ingrosser: So selling Corn in the Sheaf is against the Common Law by Robert Hadham's Case, cited in Coke's Pleas of the Crown, and punishable by the King, but no particular person can have an Action for such ingrossing more than every man; yet these are Nufances by the Common Law, but so made by prohibiting Laws beyond memory: As by a Law of King Athelstans, Ne quis extra oppidum quid emat, forestalling was prohibited. And by several Laws of William the First, Ne venditio & emptio fiat nisi coram testibus & in civitatibus. Item nullum mercatum vel forum sit, nec fieri permittatur, nisi in civitatibus regni nostri. And no way differ from publique evils now prohibited by Parliament, and may, by it, be permitted, for the Statute of 15 Car. 2. c. 5. gives leave to ingross without forestalling, when Corn exceeds not certain Rates. Nor see I any reason why the King may not dispense with those Nufances by which no man hath right to a particular action, as

Cok. f. 197. c.  
89. Hill. 25  
E. 3. coram  
Rege.

Sax. Laws. l.  
49. c. 12.  
Will. the first  
Laws. f. 171.  
c. 60, 61.  
Cok. Pleas  
Coron. 197.

15 Car. 2. c. 5.

well as he may with any other offence against a penal Law, by which no third person hath cause of Action.

Whence it follows, That if an Act of Parliament call an offence a Nuisance, from which no particular damage can arise to a particular person, to have his Action, the King may dispense with such a nominal Nuisance as with an offence against a penal Law, for which a man can have no Action for his particular damage.

5. The Register hath no Writ of Ad quod damnum, upon any Licence to be granted, but for alienation of Capite Land, or in Mortmain, or for diverting or obstructing a Water-course, or High-way, in which Cases the Writ is directed to the certain Sheriff or Escheator of the County, where the Land-way or Water-course lye, but for Licences for other things, as Exportation or Importation of prohibited Commodities, a Writ of Ad quod Damnum, cannot be directed to any certain Sheriff, or other Officer, to enquire.

Nor is it enough to make a thing malum per se, because prohibited at Common Law: But the reason is,

The word Murther (ex vi termini, in the Language it is us'd in) signifies unlawful killing a man. The word Adultery, unlawful Copulation; Stealing, unlawful taking from another; Perjury, unlawful swearing; and Trespass, ex vi termini, an unlawful imprisonment, or unlawful entry, or the like, upon anothers House or Lands, and so do the other mala instant.

If these mala might be dispens'd with, in regard a dispensation, as I said, makes the thing to be done lawful to him who is dispens'd with, it follows, that the dispensation would make unlawful killing, which the word Murther imports, vi termini, to be lawful; unlawful taking from another, which the word Stealing imports, to be lawful; unlawful Swearing, which Perjury imports, to be lawful; an unlawful Entry upon a mans House or Land, which the word Trespass imports, to be lawful, and so of the rest.

So the same thing, at the same time, would be both lawful and unlawful, which is impossible.

For the same reason, a Law making Murther, Stealing, Perjury, Trespass, or any the rest of the mala instant'd in lawful, would be a void Law in it self.

For a Law which a man cannot obey, nor act according to it, is void, and no Law : And it is impossible to obey contradictions, or act according to them.

Therefore I may conclude those things to be mala in se, which can never be made lawful.

The instances in that Book of 11 H. 7. are none of these, but near them : the words are, But malum in se, the King, nor any other can dispense. And instanceth,

Si Come, si le Roy, voyloit pardon de occider un homme ou de faire nuisance in le haut chemin, ceo est void.

Alhere by the way, pardon is mis-printed for pocr done, for the King may pardon killing a man ; but if the King will give power to kill a man, or to make a nuisance in the High-way, it is void.

And upon the same reason, a licence to imprison a man, to take his Land, his Horse, or any thing that is his from him, is void.

For in life, liberty, and estate, every man who hath not forfeited them, hath a property and right which the Law allows him to defend ; and if it be violated, it gives an Action to redress the wrong, and to punish the wrong-doer.

Therefore a dispensation, that is, to make lawful the taking from a man any thing which he may lawfully defend from being taken, or lawfully punish if it be, must be void.

For it is a contradiction to make it lawful, to take what may be lawfully hindered from being taken, or lawfully punished, if it be.

And that were to make two men have several pleary rights in the same thing at the same time, which no Law can effect : Therefore to do a thing which no Law can make lawful, must be malum in se.

But these instances differ from the former ; for killing a man, or taking from him his Lands or Goods, do not import, ex vi termini, that which is unlawful, as Murther and Stealing do ; for in many Cases killing a man, or taking his liberty or goods from him, is lawful, and where it is not, may by a Law be made so, which the other can never be.

As every new capital punishment ordained by Law, makes killing a man lawful where it was not before ; every new aid granted out of mens estate, makes a taking from men lawful that was not before.

But



But this is because a Law can alter, change, or transferr a mans property in life, liberty, estate, or any interest, as it will, which cannot be done without a Law, and thereby nothing unlawful is made lawful: But the property which a man had, and was the subject matter of the unlawful doing or taking before, is alter'd or transferred to another, either in toto or in tanto.

So as to violate mens properties is never lawful, but a malum per se, as that Book is of 11 H. 7. and according to that of Bracton;

Bract. l. 3. f. 132 Rex non poterit gratiam facere cum injuria & damno aliorum quod autem alienum est dare non potest per suam gratiam.

But to alter or transferr mens properties to others, is no malum per se, it is daily done by the owners exprels consent, and by a Law without their exprels consent.

And as the Law is, the Lord of a Villain may transferr his Villains property, in Lands or Goods, to himself, by entry or seizure: And it is the signal difference between a Freeman and Villain, that it cannot be done to a Freeman, nor yet to a Villain to the use of any but his Lord.

The Learned and Judicious Grotius, in his excellent Work de Jure belli ac pacis, is most apposit upon this subject:

Grot. de Jure belli ac pacis, l. 1. c. 1. Sect. 5, 6. Sicut ergo ut his duo non sint quatuor, ne à Deo quidem potest effici, ita ne hoc quidem, ut quod intrinseca ratione malum est, malum non sit. And then follows, after some further explanation of his notion, Ita, si quem Deus occidi præcipiat, aut res alicujus auferri; non licitum fiet Homicidium aut furtum (quæ voces vitium involvunt) sed non erit Homicidium aut furtum; quod vitæ & rerum supremo Domino auctore sit. And it is the same to say,

Si quem Lex occidi præcipiat aut res alicujus auferri, non licitum fiet homicidium aut furtum (quæ voces vitium involvunt) sed non erit homicidium aut furtum quod a lege vitæ & rerum potestatem habente, auctore sit.

If any need further satisfaction concerning what hath been said on this occasion, he may resort with success to the place quoted of that great Lawyer.

But it is to be observed, That altering or changing property is no subject matter for a dispensation. A man is not dispens'd with to do an act which he cannot do, but to do an act which simply he can do, but the Law prohibits his doing it, penally.

But altering or changing property is an act simply out of his power to do, which should be dispens'd with in that behalf.

And

And thus we see violation of property is a malum per se by that Book of 11 H. 7. and the reason why it is so, and cannot be dispens'd with.

A third kind of malum per se by that Case of 11 H. 7. is that which the Law of the Land admits to be specially prohibited, Jure Divino, Et l'int le Roy, ne nul Evêque ou Presbiter poit doner liscence a un de faire Lectery, Quia est malum in se, saith the Book, that is Coition without wedlock, which offence, when by mutual consent, injures no property, having two husbands or two wives at the same time; but that is also against the property of the first husband or wife, marriage within the Levitical degrees. All which are admitted by the Law of the Land to be prohibited, Jure Divino, and cannot be dispens'd with; For no Human authority can make lawful what Divine authority hath made unlawful, without Gods leave, and then it is by his authority. 11 H. 7.  
31 H. 8. c. 38.

Many more particulars fall under this head, which I shall not now mention. Hence I infer mala in se to be only such as imply a contradiction to be made lawful, and consequently what may be made lawful by Human Law to be no malum in se, as not differing from other things which may be permitted or prohibited occasionally, at the pleasure of the Law-maker.

The King cannot dispense with a Nuisance to the High-ways by 11 H. 7. and consequently, as some think, with no other publique Nuisance, by Sir Edward Coke. For all common Nuisances, as not repairing Bridges, High-ways, &c. the Suit is the Kings, but he cannot pardon or discharge the Nuisance or the Suit for the same, the High-ways being necessary to support such of his Subjects as are occasioned to travel them: Of this more hereafter. Cok. Pleas of  
the Crown, f.  
237. c. 105.

The specifical offences, which are publique Nuisances, I do not reckon to be mala in se, as some do, because though it be admitted none of them can be dispens'd with, yet a Law may make them lawful; and if so, they are not mala in se, as before.

But either a dispensation, or a Law to commit Nuisances (in those terms) I conceive to be void, because the word Nuisance imports a thing, vi termini, that is unlawful as Trespass doth; and therefore it is a contradiction to make it lawful by a dispensation or Law.

But by a Law, a Baker or Victualler may sell Bread or Ale of such weight or measure as he pleaseth, and as they did before the Assize was made. By a Law a Water-course may be diverted; Corn growing in the field, or Provision going to a Market may be bought up by the way, which are Nuisances in Specie, so

so of the rest; and therefore not mala in se, as some have thought, but mala politica, as they are prohibited.

But obstructing a High-way, diverting a Water-course; breaking down a Bridge, breaking the Assise of Bread and Ale; cannot be dispens'd with, though they are only punishable by the King, because such a Dispensation would take away the Action of those who had particular damage by the offence done.

But a Dispensation to buy the standing Corn of such a particular man, or field, or a certain provision going to such a Market, such a Market-day, may be good, for no man can declare upon a particular damage to himself thereby, for if any man could, every man could; but a general dispensation in either kind, were an abrogation of the Laws which prohibit them, which cannot be.

Next, some Nuisances are permanent, and continue still, until removed, as Ditches, Hedges, or other obstructions to the High-ways, diverting Water-courses, decay of Bridges; these cannot be pardon'd, nor the Suit for them, until removed; but breaking the Assise of Bread and Ale, buying provision in the way to Market, ingrossing a certain quantity of Corn, these are transient Nuisances, as I conceive, which continue not, but cease, until done de novo, and such may be pardon'd, and the Suit for them (as I conceive).

And note, if a man have particular damage by a soundrous way, he is generally without remedy, though the Nuisance is to be punish'd by the King. The reason is,

Because a soundrous way, a decay'd Bridge, or the like; are commonly to be repaired by some Township, Vill, Hamlet, or a County who are not corporate, and therefore no action lyes against them for a particular damage, but their neglects are to be presented, and they punish'd by fine to the King.

But if a particular person, or Body Corporate, be to repair a certain High-way, or portion of it, or a Bridge, and a man is endamaged particularly by the soundroushness of the way, or decay of the Bridge, he may have his Action against the person or Body Corporate, who ought to repair for his damage, because he can bring his Action against them; but where there is no person against whom to bring his Action, it is as if a man be damaged by one that cannot be known.

11 H. 4. f. 83. a.  
Rolls Actions  
for Case, f.  
104. l. 2.

Though

Though no person, Natural or Corporate, can have an Action for a publick Nuisance, or punish it, but the King, upon presentment or indictment, as appears 3 E. 2. Where the Mayor and Commonalty of London brought an Action upon the Statute for forestalling the Markets, and after selling at double the rate, because no particular damage was alledg'd, without which the Suit was only the Kings, the Plaintiffs had nothing by their Action.

Fitz. Action  
sur le Stat. 3  
E. 2. n. 26.  
which shews  
it must be the  
Stat. de Pistor-  
ibus in 31 E. 2.

For if by any publique Nuisance a man have a particular damage, he may have his Action on the Case against the Nuisance-maker.

27 H. 3. 26, 27.  
Cok. Litt. f. 36.  
2. Cok. pl. Co-  
ron. tit. Par-  
don.

And the reason why the King cannot dispense in such Cases, is, not only as Nuisances are contra bonum publicum, but because if a Dispensation might make it lawful to do a Nuisance, which differs from a Licence, to continue a Nuisance in the reason of it, the person damaged by it would be deprived of his Action, for an Action cannot lye for doing that which was lawfully done; and it is the same to alter or change property, by making what is mine to be lawfully another mans, as to licence another to damage me, and I shall have no Action or Remedy for it: And no offence against a penal Law could be dispenc'd with, if the reason of not dispensing were because the offence is contra bonum publicum, for all offences by penal Laws are such.

And it is observable, That if upon the Return of an Ad quod dampnum it appear to be ad dampnum vel prejudicium of no man, the King may then licence the stopping up of an ancient High-way, or diverting a Water-course, or part of it, for the concern is then wholly his own, but without his licence it can never be done, though a better way be set out, and so return'd upon an ad quod damnum.

Cro. 8 Car. 1.  
f. 266, 267.  
The King  
vers. Ward.

## Offences against penal Laws to be dispens'd with.

1. There are many penal Laws, by transgressing which the Subject can have no particular damage, and therefore no particular Action; for the Law gives not particular Actions regularly but for particular damage.



2. If any man might have an Action when he had no more damage than every other man had, thousands should equally have their several Actions, which the Law permits not.

11 H. 7. f. 12.  
1 H. 7. f. 3.

As if Transportation of Wooll, Mony, Corn, Horses, Bell-metal, Beer, or the like, be penally prohibited by Acts of Parliament, no Subject can deserve a particular damage to himself for having an Action against the Offender.

Secondly, If one might have an Action for such offences, every man might have the like, therefore such offences are only to the King's damage in his publique Capacity of Supreme Governour, and wronging none but himself, he may (as every man else may) dispense with his own wrong, when it is absque damno & injuria aliorum.

And though such Laws are pro bono publico in some sense, they are not Laws pro bono singulorum populi, but pro bono populi complicati, as the King in his discretion shall think fit to order them for the good of the whole.

In this notion the estate of every Pater familias may be said to be pro bono Communi of his Family, which yet is but at his discretion and management of it; and they have no interest in it, but have benefit by it.

### Offences not to be dispens'd with.

There are other penal Laws by Acts of Parliament, and punishable at the Kings Suit by Indictment or Presentment; the transgressing of which is to the immediate wrong of particular persons, and for which the Law gives them special Actions, with which the King cannot dispense: As he cannot licence a man to commit maintenance, to make a forcible entry, to carry distresses out of the hundred, contrary to the Statute, which yet are no Mala in se; for it is no Malum in se to maintain in a just cause, to enter forcibly where the entry is lawful, to carry a distress farther or nearer; but are mala when prohibita, and non when permissa, as they would be were the Laws repeal'd, and were before they were made: From whence it is clear, there are mala prohibita by Acts of Parliament with which the King cannot dispense: And next, it follows not, that a Malum with which the King cannot dispense, is a Malum in se, which are the exceptions I took to the receiv'd Rule, out of the Case of 11 H. 7.

8 H. 6. c. 9.  
Stat. 1 & 2 P.  
& M. c. 12.

No non obſtante can diſpenſe in theſe Caſes, and many the like, for that were to grant that a man ſhould not have lawful Actions brought againſt him, or be impleaded at leaſt in certain Actions, which the King cannot grant.

For the ſame reaſon the King cannot licence a Baker, Brewer, or Viſtaller, to break the Aſſiſe of Bread or Ale, nor a Miller to take more Toll than the Law appoints, nor a Taverner to break the Aſſiſe of Wine, nor a Butcher to ſell meaſed Swines fleſh, or Murrain fleſh, nor any man to foreſtall the Market by a non obſtante of the Statute de Piſtoribus, which prohibits all theſe under ſevere penalties.

Nor can he licence Butchers, Fiſhmongers, Poultrers, or other ſellers of Viſtuals, nor Poſters to ſell Hay and Oats at what price they pleaſe, by a non obſtante of the Statute of 23 E. 3. c. 6. and 13 R. 2. c. 8. which require that the prices be moderate. And it was ſo reſolved and decreed in the Star-Chamber by opinion of all the Judges, 9 Car. 1. and that the Juſtices of the Peace, in the reſpective Counties, were to aſcertain the prices of Hay and Oats.

He cannot licence a Labourer to take more wages, nor any Officers to take more fees than the Law allows, nor to diſtrain a mans Plough-Beaſts, where there is other diſtreſs; for in theſe, and multitudes of like caſes the damaged perſon hath his Action equally as for a Nuiſance, to his particular hurt.

And even in the Caſe of a Common Informer, who cannot ſue but in the King's Name, as well as his own, when he is once intitled to Action, which he never is but by commencing Suit, for then the Action popular is become his proper Action, the King can neither pardon, releaſe, or otherwiſe diſcharge his right in the Suit, as is fully reſolved 1 H. 7. and in many other Books, much leſs can he diſcharge or prevent the Action of any other man.

The Statute of 12 Car. 2. c. 25. upon which this Caſe ariſeth, hath examples of penal Laws in both theſe kinds.

1. Every man is prohibited to ſell Wine by retail, contrary to the Act, upon forfeiture of Five pounds for every offence; from which offence no third man can poſſibly derive a particular damage to himſelf, for which he can have an Action upon his Caſe.

2. If any man should have an Action because another sold a pint of Wine without licence, every man should have the like Action which the Law permits not.

Whence it follows, That the offence wrongs none but the King, and therefore he may, as in like Cases, dispense with it.

By a second Clause in that Act, the mingling of Wine with several Ingredients therein mentioned, is penally prohibited; as by another Clause the sale of Wine at greater prizes than the Act limits.

He that shall offend, either by unlawful mixtures, or by selling dearer than the Law admits, doth a particular wrong to the buyer, for which he may have his Action; and therefore the King cannot dispense with either of those Offences.

### Dispensations void against Acts of Parliament for maintaining Native Artificers.

The Case of  
Monopolies,  
the eleventh  
Report.

If Forreign Manufactures, or Forreign Corn, as by the Acts of 3 E. 4. c. 4. & 3 E. 4. c. 3. be prohibited for support of those Artificers, and the Husbandmen within the Kingdom, a Licence to one or more to bring them in, if general, is void by the Case of Monopolies, notwithstanding a Non obstante.

1. All penal Laws, when made, and in force, are equally necessary, and in things necessary there is no gradation of more or less necessary.

2. If any penal Laws were possibly less dispensable than others (but upon the differences already given) those capitally penal were less dispensable than those less penal; but it is not so, for coining money of right Alloy in imitation of the Kings Coyne, is capitally penal without licence, but it may be licensed.

1 H. 7. f. 3. If transporting Wooll were Felony, yet the King may licence it.

It is capital to multiply Gold or Silver by the Statute of 5 H. 4. c. 4. but may be licenc'd; as was done to John Faceby, tempore H. 6. the Dispensation with a non obstante of that Statute may be seen, Coke's placita Coronæ, f. 74. c. 20.

Coke's plac. Coronæ, f. 74. c. 20.

If an Ad quod damnum issue to enquire ad quod damnum vel præjudicium, a licence for a Mortmain will be: One Inquiry is—Si patria per donationem illam magis solito non oneretur, &c. Though the Return be, that by such licence patria magis solito oneretur, yet the licence, if granted, will be good, which shews that Clause is for Information of the King, that he may not licence what he would not, and not for Restraint, to hinder him to licence what he would. For by Fitz-herbert the usual licence now is with—Et hoc absque aliquo brevi de Ad quod damnum. And when the King can licence without any Writ of Ad quod damnum, he may, if he will, licence whatever the Return of the Writ be. Though it be said in the Case of Monopolies, That in the Kings Grant it is always a Condition expressed or implied, Quod patria plus solito non oneretur, but that seems but gratis dictum.

Fitz. Nat. Br.  
Ad quod  
damnum, f. 222  
b. Letter D.

So if the King will, ex speciali gratia, licence a Mortmain, the Chancellor need not issue any Ad quod damnum, for the King, without words of Non obstante, is sufficiently appais'd by asking his licence to do a thing, which at Common Law might be done without it, that now it cannot be done without it. And that is all the use of a Non obstante.

Dyer 9, 10  
El. f. 269. a.

But whether in such Cases licences limited to certain quantities of the Commodities to be imported be good (as some collect from that Case, as it is reported, which appears not by the Judgment) nor in what Cases licences may be general, or ought to be limited, is not now properly before us.

1. If Exportation, Importation of a Commodity, or the exercise of a Trade be prohibited generally by Parliament, and no cause expressed of the Prohibition, a licence may be granted to one or more without limitation to Export or Import, or to exercise the Trade: For by such general Restraint the end of the Law is conceived to be no more than to limit the over-numerous Exporters, Importers, or Traders in that kind, by putting them to the difficulty of procuring licences, and not otherwise, and therefore such general licences shall not be accounted Monopolies.

2. In such Cases the Law implies the King may licence as well as if the prohibitory Law had been that no such Importation, Exportation, or Trading should be without the King's express licence, in which Case the licence requires no limitation to a certain quantity.



3. It is apparent, That if the exercise of a Trade be generally prohibited, the King's Licence must be without any Limitation to him that hath it, to exercise his Trade, as before it was prohibited, else it is no licence at all.

4. Where the King may dispense generally he is not bound to it, but may limit his Dispensation if he think fit.

5. If to avoid a Monopoly his Dispensation upon all prohibitory Laws generally must by Law be limited; his limited Dispensation may be for greater quantities than were Imported or Exported before the Restraint, because the quantity in the Dispensation is left indefinite, and may be any quantity certain, and consequently the end of the Restraint equally frustrated, and the Monopoly as effectual as if the Licence had been general, though it be limited.

6. If a Commodity be prohibited to be Exported or Imported, because too great quantities of it is carried out, or brought in, the Licences ought to be limited to answer the end of the Act.

7. If Importation of a Commodity be prohibited, to maintain the Native Artificers of that Commodity in the Kingdom with libertyhood, and so of Exportation, no Licence, either with stint or limitation, or without it, seems good by way of Merchandise; for both of them may equally frustrate the end of the Act in the support of the Native Artificers for the former reason, but such a Licence may be good to Import for a mans private use, though in the Case of Monopolies it is said, Such a Licence (without any Limitation) is a Monopoly, which is as much perhaps by implication, as to say that such a Licence with a Limitation is no Monopoly, quod non credo.

As to the second Question; Admitting King James might have dispens'd with particular persons for selling Wine by Retail, as the constant course hath been since the Statute of 7 E. 6.

Whether he could dispense with a Corporation, or with this Corporation of Vintners, and their Successors, as he hath done, having no possible knowledge of the persons themselves, or of their number, to whom he granted his Dispensation? which is the Reason insisted on why his Grant is not good. As to that,

1. First,

1. First, That the nature of the offence is such as may be dispens'd with, seems clear in reason of Law, and by constant practice of licencing particular persons.

2. Where the King can dispense with particular persons, he is not confined to number or place, but may licence as many, and in such places, as he thinks fit.

An Act of Parliament, which generally prohibits a thing upon penalty which is popular, or only given to the King, may be inconvenient to divers particular persons, in respect of person, place, time, &c. For this cause the Law hath given power to the King to dispense with particular persons.

But that Case touches not upon any inconvenience from the largeness of the Kings dispensation, in respect of persons, place, or time, which the Law leaves indefinite to the pleasure of the King, as the remedy of inconveniences to persons and places by the penal Laws, some of which may be very inconvenient to many particular persons, and to many trading Towns, others but to few persons or places, and the remedy by Dispensation accordingly must sometimes be to great numbers of persons and places, and sometimes to few.

If the wisdom of the Parliament hath made an Act to restrain pro bono publico, the Importation of Foreign Manufactures, that the Subjects of the Realm may apply themselves to the making of the said Manufactures for their support and livelihood, to grant to one or more the Importation of such Manufacture (without any limitation) non obstante, the said Act is a Monopoly, and void.

3. It is admitted a Corporation is capable of a Dispensation; as where the King hath an Inheritance in the thing concerning which the Dispensation is (so it was express'd) and therefore he may dispense with a Corporation of Merchants, or with a Town Corporate, not to pay Customs for some Commodity, as he may with particular persons.

This seems to end the Question; For if the offence in its nature may be dispens'd with, and a Corporation be capable of a Dispensation, the King's not knowing the persons or numbers (which is the pretended reason) will not avoid the Dispensation in the present Case of the Vintners.

For by the same reason dispensations to Corporations, and their Successors, would be void in all Cases, as well as in this; for their persons and numbers must be equally unknown to the King, in every Case, as in the present Case.

That a dispensation may be granted to a Body Corporate or Aggregate, as well as to private persons. Suarez de Legibus, which Mr. Attorney cited in this Case, and is in truth a most learned Work, is very express.

Suarez de  
Legibus l. 6.  
c. 12. f. 416.

Dispensatio autem per se primo versari potest circa personam privatam, quia solum est particularis exceptio à Comuni Lege; potest etiam ferri circa communitatem aliquam quæ sit pars majoris communitatis, sicut uni Religioni, Ecclesiæ aut Civitati conceditur privilegium, per quod excipitur à Lege Comuni. Potest etiam concedi toti communitati pro uno Actu, vel pro certo tempore per modum suspensionis. This last must be understood where the Dispensator is the intire Law-maker.

Laertius Cherubinus his  
Bullarium.

And accordingly Dispensations are as frequently granted by the Pope, from whom the use of Dispensations was principally derived to us, to Bodies Corporate, that is, to religious Orders, as to private persons, as is apparent in the Bullaries, if any will consult them; but I forbear citing them, because they are Foreign Authorities.

2 R. 3. f. 11, 12.  
1 H. 7. f. 2, 3.

E. 3. licens'd the Citizens of Waterford in Ireland, their Heirs and Successors, to carry their Staple Merchandise to what parts they pleased beyond the Seas, being bound under great penalties by Act of Parliament, to bring them to the Staple. And the Judges twice assembled 2 R. 3. & 1 H. 7. made no question of the Kings Dispensation, but the Question was because later Laws of Henry the Sixth's time had enaged the bringing of Irish Merchandise to the Staple at Calice.

Regist. ad  
quod dam-  
num, f. 252. b.

The King may licence an Aggregate Body Corporate, and their Successors, to damm up an ancient Current of the Sea through their Land for carriage by water to a Mill, and that such passage and carriage shall be by a new Current, as commodious, as appears by a Writ of Ad quod damnum in the Register, in the Case of the Prior and Covent of Christ-Church in Canterbury, which is a Body Corporate.

Regist. f. 254. b.

The like licence may be to such Body Corporate, and their Successors, to bring the Water-course of a Well for the use of that Community, as by like Writ of Ad quod damnum appears in the Case of the Prior and Covent of K. for diverting such a Water-course for the use of their House.

And

And by another like Writ, in the Case of the Fraternity of Fryers Minors, for diverting of a Water-course, or part of it, to serve the House of the Fraternity. Regist. f. 255. a

And so a Licence may be to a Corporation to stop up a High-way through their Land, a more commodious being by them set out in place of it, as is common in the Cases of particular persons.

And in all these Cases, the benefit of the Licence is to every particular person of the Corporation, more than to the Body Politique.

And these are not Licences where the King hath an Inheritance, unless all High-ways and Water-courses be accounted the Kings Inheritance.

The like Dispensation or Exemption the King may grant to a Corporation that they shall be Toll-free, which extends to every man, and not to the Corporation only in their Corporate Capacity.

And a Dispensation and Exemption differ in sound only; for a Dispensation is properly to licence a person to do a thing which he can do, but is by a Law penally prohibited from doing it.

An Exemption is properly to licence a man, or men, not to do a thing which they are penally by a Law precepted to do.

Edward the Third granted to the Bailiffs, Mayor, and Burgeses of Oxford, that none of them should be sworn in Juries with Foreigners that were not of the Town. 4 H. 6. f. 6.

The like Grant was made to the Commonalty and Citizens of Norwich by Edward the Fourth, that they should not be put in Juries out of the Town of Norfolk. These are Dispensations or Exemptions to a Corporation, and their Successors, that none of them should serve in Juries but within their Corporation, which otherwise by the Law they must have done: And the like we meet with daily to other Towns in the Circuits. 21 E. 4. f. 56.

Now if it shall be said, That High-ways, the Water-streams, Tolls of Markets, Fines of Jurors, and the like, are the Kings Inheritance as well as his Customes are; and therefore the King, as to them, may dispense with Corporations, Then

It is clear, That penal Laws (the breach of which enables no man to an Action for his damage thereby) and the forfeiture and punishment for breaking them are much more the Kings Inheritance.



Therefore, ex concessio, the King may dispense with Corporations as to them.

Pl. Com. f. 487  
Nicholls C.

2. The King cannot dispense in any Case, but with his own Right, and not with the Right of any other. And every Right of the Crown is its Inheritance or Interest: Therefore where the King can dispense at all, he hath an Inheritance or Interest, and consequently where he can dispense at all, he may dispense to a Corporation.

If the Laws of 7 E. 6. and 12 Car. 2. had been penn'd thus, Every man that sells Wine contrary to this Act, shall pay the King Two pence for every pint so sold; this Two pence had been a Duty and Inheritance to the King, as his Customes are, without difference; and as the Duty of Six pence lately was upon every quart of French Wine retai'd. Why then, the greater or less the Duty be, alters not the nature of the King's Inheritance in the Duty.

Therefore if the Acts had been, That every seller of Wine, contrary to the Act, should pay the King Five pounds for every pint sold, these Five pounds had equally been the King's Duty and Inheritance, as the Two pence before; and there had been no restraint to sell, but what was made by payment of so great a Duty to the King?

Secondly, The Acts so penn'd had equally binded the selling of Wine, as now they do by words, prohibiting sale upon forfeiture of Five pounds; for in both Cases the payment of Five pounds, whether by Forfeiture or Duty, is that which only prevents the selling.

Therefore the Laws were the same in effect, either way penn'd; and consequently the Forfeiture of Five pounds given, as the Acts stand penn'd, is equally the King's Inheritance, as if it had been given by way of Duty.

In the next place I will shew what Dispensations or Licences are, as I conceive, unquestionably good to Corporations, and their Successors.

1. A Licence to purchase in Mortmain, which none can have but a Corporation or single Body Politique.

2. A Licence to make a Park, Chase, or Warren in their own Ground, which the Law prohibits to be done without licence.

3. A Licence to convert some quantity of their ancient Arable Land into Pasture, which was prohibited by the Acts of 4 H. 7. 5 Eliz. and divers other Laws; most of which were repeal'd in 21 Jac. which is not material. as to the Question in hand. And that is an Offence also at the Common Law, and I remember it proceeded against as such, tempore Cal. i. in the Star-Chamber, after the Repeal of most of the Statutes prohibiting it.

4. A Licence to convert part of their Wood-land into Arable, contrary to the Statute of 35 H. 8. and contrary also to the Common Law.

I have a Note of a Charter of King John, to an Abbot and his Covent, by which they had Licence, Nemora sua pertinentia Domui suae redigere in culturam.

5. A Licence to erect some Cottages upon their Waste, or other Lands, contrary to the Statute of 31 Eliz. c. 7.

31 El. c. 7.

6. A Licence to erect a Fair or Market.

7. A Licence to an Abbot and his Covent, to appropriate a Rectory.

a Pl. Com.  
Grondons C.

In all these Cases the King hath no knowledge of the persons themselves, or of their number, to whom he grants his Licence or Dispensation: Therefore that can be no reason to avoid the Charter of the Corporation of Vintners.

A Dispensation or Licence properly passeth no Interest, nor alters or transfers Property in any thing, but only makes an Action lawful, which without it had been unlawful. As a Licence to go beyond the Seas, to hunt in a mans Park, to come into his House, are only Actions, which without Licence, had been unlawful.

But a Licence to hunt in a mans Park, and carry away the Deer kill'd to his own use; to cut down a Tree in a mans Ground, and to carry it away the next day after to his own use, are Licences as to the Acts of Hunting and cutting down the Tree; but as to the carrying away of the Deer kill'd, and Tree cut down, they are Grants.

So to licence a man to eat my meat, or to fire the wood in my Chimney to warm him by, as to the actions of eating, firing my wood and warming him, they are Licences; but it is consequent necessarily to those Actions that my Property be destroyed in the meat eaten, and in the wood burnt, so as in some Cases by consequent and not directly, and as its effect, a Dispensation or Licence may destroy and alter Property.

Trin. 2 Jac.

To the Presidents of Wright versus Horton, &amp; alios.

Of Norris versus Mason, Trin. 2 Jac. Both which were the same Cases with the present, upon the Letters Patents of Queen Elizabeth, the Ninth of her Reign, to the Vintners of London.

Of Young versus Wright. Mich. 12 Car. 2.

No Answer hath been given, but that which is none, viz. That the two first Judgments were without Argument, which is not essential to a Judgment; and Judgments are frequently given when the Cause is conceiv'd clear (as it seems these were conceiv'd) if there were no Argument, which is but a Non liquet.

The Answer to the last President is, That the Judgment upon the Roll is torn off. That some of the Judges are living who gave the Judgment, and many more who know it to have been given.

### Other Presidents of Licences to Corporations.

6 H. 8. 1.

A Special Licence to the Fraternity of *Corvisers*, London, to exercise their Callings, notwithstanding a penal Statute to the contrary, 1 R. 3.

1 E. 6. 4.

Inhabitantibus in Com. *Norf.* & Civitat. *Norwic.* authoritat. bargainizare pro Lanis, non obstante Statuto 37 H. 8.

2 E. 6. 3.

Mercatoribus de *Venice* Licenc. Special. emere in aliquo Com. hujus regni *Angl.* 500 Saccas Lanarum, ac illas operare, & sic operat. in partes externas, & transmarinas carriare absque impedimento, non obstante Statut. 4 H. 7.

7 E. 6. 6.

Mercatoribus transeuntibus Licenc. asportare pecun. contra formam Statuti.

1 E.

1 E. 6. 7.

*Johanni Gale* Mil. Licenc. pro omnibus suis servis sagittare in vibrell. non obstante Act. Parliament. Conf. *Tho. Com. South.*

2 R. 3. 1.

A Proclamation dispensing with a penal Statute touching Cloth-making, 1 R. 3.

9 Eliz. 3.

*Henr. Campion* & al. Brafiator. de *Land. & Westm.* licenc. retinere alienos in servitiis suis.

27 H. 8. 2.

Major. Civitat. *Heref.* Licenc. perquirere terram ad Annum valorem 40 Marcarum, non obstante Statuto.

36 Eliz. 3.

Ballivis, &c. de *Yarmouth*, magna Licenc. transportare 40000 quarter, frument. & gran. infra 10 Ann.

26 Eliz. 7.

President. &c. Mercatorum *Hispania & Portugal.* infra Civitat. *Cestr.* Licenc. transportare 10000 Dickers of Leather per 12 Ann.

1 M. 2.

Mercatoribus de le *Stillyard*, Licence for three years to Export any manner of Woollen Cloth, at 6 l. and under, unrowed, unbarbed, and unshorn, without forfeiture.

1 M. 11.

Mercatoribus periclitant. a Licence to transport all manner of Woollen Cloth, non obstante Stat.

*Roberto Heming* & alios, Licence to sell Faggots within *London* and *Westminster*, non obstante Stat.

2 Jac. 22.

A Licence to the Gun-makers of *London* to transport Guns.

4 Eliz. 2.

A Licence to the Mayor, &c. of *Bristol*, that they may lade and unlade their Ships, &c. of their Goods, and lay the same on Land, and from Land to transport them, Non obstante Statut.

6 Eliz.



6 Eliz. 11.

Mercatoribus Periclitari. Licence to transport their Merchandises in strange Ships, Non obstante Statut.

5 Car. 1.

Mercatoribus de le *East-Indies*, Licence to transport 10000 l. in English Gold.

### Objections against the Patent 9 Jac.

Obj. 1.

The Case of  
penal Laws  
Seventh Rep.  
Answ. 1.

Brook Com-  
mission, n. 5.

That by this Patent every Freeman of London, and of the Corporation of Vintners, which freedom the City and Corporation gives to whom they please, is dispens'd with. So in effect the City of London and Corporation of Vintners give Dispensation to sell Wine, which by Law none but the King can grant, as is resolved in the Seventh Report.

The King Incorporates a Town by name of Mayor and Burgeses, with power to the Burgeses annually to choose a New Mayor, and grants that every Mayor, at the end of his Majoralty, shall be a Justice of the Peace in that Corporation: It is no Inference, because the Burgeses elect the Mayors, that therefore they make Justices of Peace, for they are made so by the King's Great Seal, and not by them. The Case is in Brook, Title Commission, N. 5.

Nor is that Case of penal Laws so generally true perhaps, if not understood where the King governs in person, and not by his Lieutenant, as in Ireland, or by Governours, as in the Plantations of the Western Islands.

The City of London grants Dispensations in this Case, no more than the Burgeses make Justices of the Peace in the other.

Obj. 2.

Another Objection made, is, That the King cannot dispense with a man to buy an Office contrary to the penal Statute of 5 E. 6. nor with one Simoniacally presented to hold the Living, nor with any of the House of Commons not to take the Oath of Allegiance, according to the Statute 7 Jac. c. 6. nor to Sue in the Admiralty for a Contract on the Land, contrary to the Statute 2 H. 4.

First.

First, It is against the known practise since the Statute of Answ. 1.  
7 E. 6. That the King cannot dispense for selling of Wine, for  
that Objection reaches to Dispensations with single Persons as  
well as Corporations.

2. The reason why the King cannot dispense in the Cases of Answ. 2.  
buying Offices and Simontacal Presentations, is because the  
persons were made incapable to hold them; and a person inca-  
pable is as a dead person, and no person at all as to that  
wherein he is incapable: For persons entred in Religion,  
and dead in Law, were not to all purposes dead, but to such  
wherein they were incapable to take or give.

3. A Member of the House of Commons is by 7 Jac. perso- Answ. 3.  
na inhabilis, and not to be permitted to enter the House before  
the Oath taken. A particular Action is given by 2 H. 4. for  
such Suit in the Admiralty, and such Licence gives the Admi-  
ralty a Jurisdiction against Law, 4 & 5 P. M. Dyer 159. Domingo  
Belatta's Case.

A third Objection was, That this general Dispensation an- Obj. 3.  
swers not the end and intention of the Act of 7 E. 6. but seems  
to frustrate and null that Law wholly: And though the King  
can dispense with penal Laws, yet not in such manner, as to anni-  
hilate and make them void.

If this Objection held good in fact, it is a material one; Answ. 1.  
but the Act of 7 E. 6. intended not that no Wine should be  
sold, nor that it should be with great restraint sold, but not  
so loosely as every man might sell it. And since it is admitted  
that the Act of 7 E. 6. restrains not the King's power to licence  
selling Wine (which perhaps was more a Question than this  
in hand) it is clear the King may licence, as if the Act had  
absolutely prohibited selling Wine, and left it to the King  
to licence as he thought fit, not abrogating the Law. And  
if so,

The end of the Act being only that every man should not Answ. 2.  
sell Wine that would, as they might when the Act was made,  
and not to restrain convenient numbers to sell for the King-  
doms use.

The King could not better answer the end of the Act, than to  
restrain the sellers to Freemen of London.

To the Corporation of Vintners, men bred up in the Trade, Answ. 3.  
and serving Apprenticeships in it.

And

Taylor's of  
Ipswich C.  
Report 11.

And that such should be licenc'd without restraint, is most agreeable to the Laws of the Kingdom, which permits not persons, who had served Seven years to have a way of liberty, to be hindred from exercising their Trades in any Town or part of the Kingdom, as was resolved in the Taylors of Ipswich Case, in the Eleventh Report. And therefore the King had well complied with the ends of the Law, had he licenced such to sell in any part of the Kingdom, which he did not, but confined them to Towns.

Obj. 4.

It hath been said to the Case of Licences to Corporations for purchasing in Mortmain,

That the Laws against Mortmain are not penal, because they may be dispens'd with without a Non obstante, and so cannot penal Laws be.

Answ. 1.

It is durus sermo that those Laws are not penal which give the forfeiture of the Land.

2. By the Statute of 1 H. 4. c. 6. and 4 H. 4. c. 4. the King is restrained in some Cases from granting as he might at the Common Law.

Therefore without a Non obstante of those Laws, it cannot appear that the King would have granted it if he had been apprais'd of those restraining Laws: Therefore a Non obstante in such Case is requisite. But when a man might, by the Common Law, purchase without licence, as in the Case of Mortmain, before the prohibiting Statutes, or might Export or Import a prohibited Commodity before restraint by Statute, a Licence ex specialia gratia is sufficient without a Non obstante: For by petitioning for a Licence, the King is sufficiently inform'd the Law permits not the thing without a Licence (which is all the use of a Non obstante). This enough appears by the Case in Dyer 269. where a Licence, ex speciali gratia, is good without issuing any Ad quod damnum in the Case of Mortmain.

3. The Writ of Ad quod damnum in that Case, which regularly issues, informs the King better than a Non obstante would do.

Obj. 5.

Next, it hath been said in the Case of Mortmain, the King dispenseth only with his own Right, and concludes not the mean Lords.

It is true, for the King in no case can dispense but with his own Right, and not with anothers.

An-

Answer hath been offered to the President of Waterford, by *Obj. 6.* which the King dispens'd with the Offence of not bringing the Staple Merchandise from Ireland to Calais, being so penal, which was an Offence by 10 H. 6. c. and 14 H. 6. c. to the universal hurt of the Kingdom, and therefore much greater than selling of Wine contrary to the Statute of 7 E. 6. c. but that was as hath been said,

Because those Merchants were to pay Custome to the King, which was his Inheritance, and with which he could dispense.

This put together sounds thus, The Merchants of Waterford were to pay Customes to the King for their Staple Merchandise, for which he might dispense if he would, but never did, for any thing appears: The Merchants of Waterford were, upon penalties, to bring their Staple Merchandise to Calais, with which the King could not dispense, had no Customes been due from them, yet he did dispense with them for that which he could not, viz. bringing their Goods to Calais, because he did not dispense with them for that which he could, viz. their Customes, there is no Inference nor Coherence in this Answer. *Answ.*

But it also appears by the Statute 27 E. 3. c. 11. of the Staple for the reason therein given, that the Merchants of Ireland were to pay their Customes in Ireland, and to bring their Cockets of their payments there to the Staple, lest otherwise they might be doubly charg'd.

Therefore the Customes which were paid in Ireland before the Goods brought to the Staple, was no cause for dispensing with the Corporation of Waterford for not bringing their Merchandise to the Staple, according to the penal Laws for that purpose. The Licence of Edward the Third, pleaded by the men of Waterford, was perhaps after the Statute of 27 E. 3. when they were not to pay their Customes at the Staple; but however, the Licences by them pleaded, 1 H. 7. by Henry the Sixth, and Edward the Fourth, were long after they were to pay their Customes in Ireland, and not at the Staple.

I must say as my Brother Atkins observed before, That in this Case the Plaintiffs Council argue against the Kings Prerogative, for the extent of his Prerogative is the extent of his Power, and the extent of his Power is to do what he hath will to do, according to that, ut summæ potestatis Regis est posse quantum velit sic magnitudinis est velle quantum potest; If therefore the King have a will to dispense with a Corporation, as it seems K. James had in this Case,  
A a a



Case, when the Patent was granted, but by Law cannot, his Power, and consequently his Prerogative, is less than if he could.

1. *Malum prohibitum* is that which is prohibited per le Statute: Per le Statute is not intended only an Act of Parliament, but any obliging Law or Constitution, as appears by the Case: For it is said, The King may dispense with a Bastard to take Holy Orders, or with a Clerk to have two Benefices, with cure; which were mala prohibita by the Canon Law, and by the Council of Lateran, not by Act of Parliament.

2. Many things are said to be prohibited by the Common Law, and indeed most things so prohibited were primarily prohibited by Parliament, or by a Power equivalent to it in making Laws, which is the same, but are said to be prohibited by the Common Law, because the Original of the Constitution or prohibiting Law is not to be found of Record, but is beyond memory, and the Law known only from practical proceeding and usage in Courts of Justice, as may appear by many Laws made in the time of the Saxon Kings, of William the First, and Henry the First, yet extant in History, which are now received as Common Law. So if by accident the Records of all Acts of Parliament now extant, none of which is elder than 9 H. 3. (but new Laws were as frequent before as since) should be destroyed by fire, or other casualty, the memorials of proceeding upon them found by the Records in Judicial proceeding, would upon like reason be accounted Common Law by Posterity.

3. Publique Nuisances are not mala in se, but mala politica & introducta, though in some passages of Coke's Posthuma's they are termed mala in se, because prohibited at Common Law, which holds not for the reasons before given: For liberty of High-ways strangers have not in Foreign Territories, but by permission, therefore not essential to Dominion, because it may be lawfully prohibited. 2. Liberty of the High-ways is prohibited with us in the night, by the Statute of Winchester, in some seasons of the year, and in times of warr, and for apprehension of Thieves in time of Peace, &c. The Assise of Bread and Ale is constituted by Statute, and may be taken away. Forestalling the Market and ingrossing hath like institution; the first was prohibited by Athelstans Laws and William the First's, and may be permitted by a Law; the second is allowed

allowed by the late Laws when Coyn is at a certain low price,  
quere the Law tempore Car. 2. the pulling down of Bridges  
wholly, or placing them in other places, may be done by a Law;  
and what may be, or not be, by a Law, is no malum in se, more  
than any other prohibitum by a Law is.

Judgment was given by the Advice of the Judges in the  
*Kings Bench, Quid Querens nil Capias.*

A a a 2

*Micb.*

In a forme-  
don in the  
Reverter.

*Micb. 25 Car. II. C. B. Rot. 253.*

*John Bole Esquire, and Elizabeth his wife, and John Ely  
Gent. and Sarah his wife, Demandants, against  
Anne Horton Widow, Tenant of*

The Writ.

ONE Messuage, Thirty Acres of Land, Fifteen Acres of Meadow, Twenty Acres of Pasture, and of the third part of One Messuage, One hundred and forty Acres of Land, Four and forty Acres of Meadow, Eighty three Acres of Pasture with the Appurtenances in Tickhill and Wellingly, which William Vescey Gent. Grand father of the said Elizabeth and Sarah, whose Coheirs they are, gave to John Vescey, during the life of the said John, and after the decease of the said John, to the heirs males of the body of the said John begotten, and for default of such issue to Robert Vescey, and the heirs males of his body begotten, and for default of such issue to William Vescey, son of the said William the Grandfather, and to the heirs males of his body begotten, and for default of such issue to Matthew Vescey, and the heirs males of his body begotten: And which, after the death of the said John, Robert, William the Son, and Matthew to the said Elizabeth and Sarah, Cousins and Coheirs of the said William the Grandfather, that is to say Daughters and Coheirs of the said John, Son and Heir of the said William the Grandfather, ought to revert by form of the said gift, for that the said John, Robert, William the Son, and Matthew, are dead, without heirs males of their bodies lawfully begotten: Then counts that

The Count.

William the Grandfather was seisd of the Premises in demand in his Demesne, as of Fee, and held the same in Socage of the late King Charles, as of his honour of Tickhill in the said County, in free Socage by fealty only, and so seisd the Eight and twentieth day of November, 1628. at Tickhill aforesaid, made his last Will in writing, and thereby devised the said Lands to the said John Vescey for life, and after to the heirs males of his body begotten: And for default of such issue, to Robert Vescey, and the heirs males of his body; and for default of

of such issue, to William Vesey the Son, and the heirs males of his body; and for default of such issue, to Matthew Vesey, and the heirs males of his body; and after the Six and twentieth of December, 1628. at Tickhill aforesaid, died so seised. And the said John, after his death entered, and was seised by force of the said gift, and died so seised without heir male of his body.

After the death of John, Robert entered by virtue of his said Remainder, and was seised accordingly, and so seised, died without heir male of his body, after whose death William entered by virtue of his said Remainder, and was seised accordingly; and he being so seised, Matthew died without heir male of his body, and after the said William died seised of the premises without heir male of his body: After the death of which William the Son, for that he died without heir male of his body begotten, the right of the Premises reverts to the said Elizabeth and Sarah, who, together with their said husbands, demand as Consens and Coheirs of the said William the Grandfather, that is to say, Daughters and Coheirs of the said John, Son and heir of the said William the Grandfather, and which after the death of the said John, Robert, William, and Matthew, for that they died without any heir male of their bodies, ought to revert to them.

The Tenant Anne for Plea saith, That the said William, The Barr.  
whose Consens and Coheirs the said Elizabeth and Sarah are, by his Deed dated the Seventh of November, 1655. In consideration of a marriage to be solemnized between him and Anne the now Tenant, then by the name of Anne Hewett, and of 1200 l. marriage Portion, and for a Joynture for the said Anne, and in satisfaction of all Dower, he might claim out of his Lands. And for settling the said Lands upon the issue and heirs of the said William, to be begotten of her the said Anne

Infeoffed James Lane and John Lane Gentlemen, of the said Premises, Habendum to them, their heirs and assigns for ever, To the use of the said William Vesey the Feoffor and his assigns, for term of his life, without impeachment of Waste, and after to the use of the said Anne the Tenant (if the Marriage succeeded between them) for term of her life for her Joynture, and after her decease to the use of the heirs males of his body on her body begotten forever; and for want of such issue to the use of the heirs females of him the said William Vesey upon her body begotten; and for want of such issue, to the use of the  
right



right heirs of him the said William Vesey; And bound him and his heirs to warrant the premises as aforesaid, to the said Feoffees and their Heirs, to the uses aforesaid.

By vertue whereof, and of the Statute of Uses, the said William was seised for term of his life, with the Remainder over as aforesaid: And after the said marriage was had and solemnized between him and the Tenant Anne.

That William died so seised without any issue of his body, and Anne survived him, and entered, and by vertue of the said Feoffment and the Statute of Uses, is seised in her Demesne as of Freehold for term of her life.

And that the said warranty of the said William descended from him to the said Elizabeth and Sarah, as Coheirs and Coheirs of him the said William the Son, that is to say, Daughters and Coheirs of John Vesey, Brother and Heir of the said William the Son, and demands Judgment if against the said Warranty the Demandants shall be received to demand; and avers her self, and Anne Hewett named in the Feoffment, to be the same person.

The Replication.

The Demandants reply, and confess the Feoffment to uses of William, as is pleaded in Barr to Lane and Lane, and their heirs, with warranty: But further say, That the said William Vesey the Son, after, that is the Four and twentieth of December, 14 Car. 2. at Tickhill aforesaid, died without any issue of his body, which they are ready to aver, and demand Judgment if they shall be barred of their Action against the said Anne by the said Feoffment and warranty.

The Rejoinder.

Anne the Tenant rejoyns that the Replication is insufficient, and demurs thereupon.

The matter of the Replication is all set forth in the Demandants Plea in Barr, but only the time of William Vesey's death, which was not material, upon which the Demandants ought to have demurred, and not to have replied impertinently.

The

## The Case upon the Pleading.

William Vesey seisd of the Land in question in his Demesne, as of Fee, held of King Charles the First, in free Socage, as of his Honour of Tickhill, by his last Will and Testament devised the same to John Vesey his eldest Son, and the heirs males of his body; and for default of such to Robert Vesey, and the heirs males of his body; and for default of such to William Vesey his Son, and the heirs males of his body; and for default of such to Matthew Vesey, and the heirs males of his body, and died. Then John entered, and died seisd without issue male, leaving two daughters, Elizabeth and Sarah, now Demandants, together with their Husbands.

After his death Robert entered, and died seisd, without issue male.

Then William entered, and was seisd, and Matthew, in the life of William, died without issue male.

William, by his Deed Indented in Consideration of an intended marriage with Anne the now Tenant, and for other Considerations, infeoffed James Lane and John Lane, Habendum to them and their Heirs, to the use of William the Feoffor, for term of his life, and after to the use of Anne Hewer, now the Tenant, for her life; then to the use of the heirs males of his body upon her begotten; and for default of such, to the use of the heirs females of his body on her begotten; and for default of such, to the use of his right Heirs: And bound him and his Heirs to warrant to the said Feoffees and their Heirs.

William, by virtue of the said Feoffment, and of the Statute of Uses, was possessed, and after he married the now Tenant, and died seisd, as of his Freehold, without any issue of his body.

After his death, Anne his wife, now Tenant, by virtue of the said Feoffment and Statute of Uses, entered and was possessed.

Against whom, Elizabeth and Sarah, Daughters and Coheirs of John Vesey, and Cousins and Coheirs of William the Feoffor, bring their Formedon in the Reverter.

Anne, the Tenant in possession, would rebutt and barr them by the said warranty of William Vesey the Son, whose Cousins and Coheirs they are (videlicet) the Daughters and Coheirs of John, eldest Brother of the said William.

And whether the said Anne, Tenant by the said Feoffment and Statute of Uses, can rebutt them by the said warranty, is the general Question?

For Resolution of which I must make these previous Questions.

The first is, If before the Statute of 27 H. 8. to Uses, Tenant in tayl had made a Feoffment in Fee to uses with warranty to the Feoffees and their Heirs, such Feoffees, in a Formedon in the Reverter, brought against them by the Heirs of the Donor, could have rebutted and barr'd them by the warranty of the Tenant in tayl?

For if the Feoffees to use in such case could not have barr'd the Heirs of the Donor before the Statute by the warranty, it is evident the Cestuy que use, since the Statute, cannot barr them; for he can have no more power since the Statute, than the Feoffees to use had before the Statute by the warranty.

I put the Case before the Statute, for clearness sake only; for though since the Statute there are Feoffees to use as before, yet no question can be made upon their rebutter by a warranty, because the Estate is out of them by the Statute as soon as it is in them.

And as to this, the Case in effect is no more than, Whether the warranty of Tenant in tayl (which must be admitted to be a Collateral warranty) descending upon the Donor, or his Heirs, will barr him or them of the Reversion.

The second Question I make, admitting the Heirs of the Donor to be barr'd by the warranty of Tenant in tayl, descending upon them, is, Whether after the Statute of Uses, the Cestuy que use can have any benefit of the warranty granted to the Feoffees to use, either by way of Voucher or Rebutter? Because the Cestuy que use is not in possession in the per by the Feoffees, but by the Statute of Uses.

The third Question is, admitting generally that the Cestuy que use shall have benefit of the warranty made to the Feoffees to use, Whether yet in this Case, Anne the Tenant being a Cestuy que use, shall have benefit of the warranty made to the Feoffees? Because neither William, the first Cestuy que use, nor his Heir, the last Cestuy que use, in the Case could, nor can have any benefit of this warranty, because William, the first Cestuy

Cestuy que use, nor his Heir, could not, nor can warrant to himself; but as to William and his Heirs, the warranty is clearly extinct.

### The Argument.

And as to the first Question, I conceive the Law to be that the warranty of William, the Tenant in tail, descending upon Elizabeth and Sarah the Demandants, his Heirs at Law, is no barr in the Formedon in Reverter brought by them, as Heirs to William their Grandfather, the Donor, though it be a Collateral warranty.

I know it is the persuasion of many professing the Law, that by the Statute of Westminster the second, De donis conditionalibus, the Lineal warranty of Tenant in tail shall be no barr in a Formedon in the Descender, but that the Collateral warranty of Tenant in tail is at large, as at the Common Law unrestrain'd by that Statute.

Sir Edward Coke, in his Comment upon Section 712. of *3ed. 712* Littleton, A lineal warranty doth not bind the right of an Estate tail, for that it is restrain'd by the Statute de donis Conditionalibus: And immediately following, A lineal warranty and assents is a barr of the right in tail, and is not restrain'd.

But the reason why the warranty of Tenant in tail, with Assents, binds the right of the Estate tail, is in no respect from the Statute de donis, but is by the Equity of the Statute of Gloucester, by which the warranty of Tenant by the Courtesie bars not the Heir, for the Lands of his Mother, if the Father leave not Assents to descend in recompence.

And therefore it was conceived, after the Statute de donis was made, that if Tenant in tail left Assents to descend in Fee-simple, his warranty should bind the right of the Issue in tail by the equity of that preceding Statute of Gloucester.

Whereas if the Statute of Gloucester had not been, the Lineal warranty of Tenant in tail had no more bound the right of the Estate tail by the Statute de donis, with Assents descending, than it doth without Assents.



For the better clearing therefore of the Law in the Case in question, I shall preparatorily assert some few things, and clear what I so assert, without which the truth of the Conclusion I hold, will not appear so naked to the Hearers as it should.

Ass. 1.

The first is, That at the Common Law the distinction of a lineal and collateral warranty was useless and unknown: For though what we now call a Collateral and a lineal warranty might be in speculation and notionable at the Common Law, as at this day a Male warranty, or a Female warranty may be, yet as to any effect in Law, there was no difference between a Lineal warranty and a Collateral; but the warranty of the Ancestor descending upon the Heir, be it the one or the other, did equally bind. And this, as it is evident in it self, so is it by Littleton, whose words are,

Lit. Sect. 697.

Before the Statute of *Glocester*, all warranties which descended to them, who are Heirs to those who made the warranties, were bars to the same Heirs to demand any Lands or Tenements against the warranties, except the warranties which commence by disseisin.

Therefore, if a Question had been at the Common Law only, Whether in some particular Case the Ancestors warranty had bound the Heir? It had been a senseless Answer to say it did, or did not, because the warranty was Lineal or Collateral, for those warranties were not defined at the Common Law, nor of use to be defined: But the proper Answer had been, That the warranty did bind the Heir, because it commenced not by disseisin for every warranty of the Ancestor, but such descending upon the Heir did bind him.

So if after the Statute of *Glocester*, Tenant by the Courtesie had aliened with warranty, had it been demanded, if the Heir were barr'd by that warranty, it had been an absurd Answer, That he was not, because it was a Collateral warranty of his Father, without Asses: For all Collateral warranties of the Father were not restrained, but his warranty in that Case which could be no other than Collateral was restrained by the Statute. Therefore

The adequate Answer had been, That the Fathers warranty bound not in that Case, without Asses, because the Statute of *Glocester* had so restrained it.

My second Assertion is, That the Statute de Donis re. Aff. 2. strains not the warranty of Tenant in tayl from barring him in the Remainder in tayl by his warranty descending upon him.

1. For that the mischief complained of, and remedied by the Statute, is, That in omnibus prædictis casibus therein recited, post prolem suscitaram habuerunt illi quibus Tenementum sic conditionaliter datum fuit hucusque potestatem alienandi Tenementum sic datum, & exheredandi exitum eorum contra voluntatem Donatoris. But the warranty of the Donee in tayl descending upon him in the Remainder, who regularly claims by purchase from the Donor, and not by descent from the Donee in tayl, could be no disinheriting of the Issue of the Donee, claiming by descent from him, against which disinheriting only the Statute provides, which is evident by the Writ of Formedon in the Descender, framed by the Statute in behalf of such Issue of the Donee, whom the Statute intends.

2. The Statute did not provide against Inconveniences or Mischiefs which were not at the time of making the Statute, but against those which were. But at the making of it there could be no Remainder in tayl, because all Estates, which are Estates tayl, since the Statute, were Fee-simples Conditional before the Statute, upon which a Remainder could not be limited:

So is Sir Edward Coke in his Comment upon the Statute de Donis, The Formedon in Reverter did lye at Common Law, but not a Formedon in Remainder upon an Estate tayl, because it was a Fee-simple Conditional, whereupon no Remainder could be limited at Common Law, but after the Statute it may be limited upon an Estate tayl, in respect of the Division of the Estates.

3. The Statute formed a Writ of Formedon in the Descender for the new Estate tayl created by the Statute, and mentions a Formedon in the Reverter, as already known in the Chancery: for the Donor; for whom the Statute likewise intended to provide, but formed or mentioned none for the Remainder in tayl.

And the Cases are common in Littleton, and in many other Books, that the warranty of Donee in tayl is Collateral to him in the Remainder in tayl, and binds as at the Common Law.

But thence to conclude, That therefore the warranty of the Donee in tayl shall barr the Donor of his Reversion, because it is a Collateral warranty also, is a gross Non sequitur; for the Donees warranty doth not therefore barr the Remainder, because it is a Collateral warranty, but because the Statute de Donis doth not restrain his warranty from barring him in the Remainder, as hath been clear'd, but leaves it as at Common Law, but it doth restrain his warranty from barring him in the Reversion, as shall appear.

There is one Case in Littleton remarkable for many Reasons, where the warranty of Tenant in tayl is lineal, and not collateral, to the person in Remainder, and therefore binds not if the Case be Law (as may be justly doubted) as Littleton is commonly understood.

*Litt. Sect. 719.* Land is given to a man, and the heirs males of his body, the Remainder to the heirs females of his body; and the Donee in tayl makes a Feoffment in Fee with warranty, and hath Issue a Son and a Daughter, and dieth, this warranty is but a lineal warranty to the Son to demand by a Writ of Formedon in the Descender; and also it is but lineal to the Daughter to demand the same Land by a Writ of Formedon in the Remainder, unless the Brother dieth without Issue male, because she claimeth as Heir female of the body of her Father engendred. But if her Brother release to the Discontinuee with warranty, and after dye without Issue, this is a collateral warranty to the daughter, because she cannot convey the right which she hath to the Remainder, by any means of descent by her brother.

1. Here the warranty of the Father, Donee in tayl, is but lineal to the Daughter in Remainder in tayl; But she claims, saith the Book, her Remainder as heir female of the body of the Donee in tayl, which differs the Case from other persons in Remainder of an Estate tayl: But of this more hereafter.

2. And by the way, in this Case Sir Edward Coke, though he hath commented upon it, hath committed an oversight of some moment, by using a Copy that wanted a critical emendation: For where it is said, That the warranty of the Father is but lineal to the Daughter, to demand the Land by a Formedon in the Remainder, unless the Brother dye without Issue-male, because she claims as Heir female of the body of her Father. By which reading and context the sense must be, That if the Son dye without Issue male of his body, then the warranty of the Father is not lineal to the Daughter, *cujus contrarium est verum*, for she can claim her Remainder as heir female of the body of her Father,

ther, and thereby make the Fathers warranty lineal to her, but only because her Brother died without Issue male.

That which deceived Sir Edward Coke to admit this Case as he hath printed it, was a deppav'd French Copy thus, Si non frere devyast sans Issue male, which truly read, should be, Si son frere devyast; and the Translation should be, Not unless the Brother dye without Issue male, but, If her Brother dye without Issue male.

Another reason is that his French Copy was deppav'd, Because the French of it is, Si non frere devyast sans Issue male, which is no Language, for that rendyed in English, is, Unless Brother dye: For it cannot be rendyed as he hath done it, unless the Brother dye, without the French had been, Si non le frere devyast, and not Si non frere devyast.

Sir Edward Coke's first Edition of his Littleton, and all the following Editions, are alike false in this Section. I have an Edition of Littleton in 1604. so deppav'd, which was long before Sir Edward Coke publisht his; but I have a right Edition in 1581. which it seems Sir Edward Coke saw not, where the Reading is right, Si son frere devyast sans Issue male: Therefore you may mend all your Littletons, if you please, and in perusing the Case, you will find the grossness of the false Copies more clearly than you can by this my Discourse of it.

And after all, I much doubt whether this Case, as Littleton is commonly understood, that is, That this lineal warranty doth not bind the Daughter without Assets descending, be Law, my Reason is, for that no Issue in tayl is defended from the warranty of the Donee, or Tenant in tayl, but such as are inheritable to the Estates intended within that Statute, and no Estates are so intended but such as had been Fee-simples Conditional at the Common Law.

And no Estate in Remainder of an Estate tayl, that is of a Fee Conditional, could be at Common Law.

All Issues in tayl, within that Statute, are to claim by the Writ there purposely foirmed for them, which is a Formedon in the Descender, not in Remainder.

3. A third thing to be cleared, is, That the Statute de Donis did not intend to preserve the Estate tayl for the Issue, or the Reversion for the Donor absolutely against all warranties that might barre them, but only against the Alienation, with, or without warranty of the Donee and Tenant in tayl only; for if it had



had intended otherwise, it had restrain'd all Collateral warranties, of any other Ancestors, from binding the Issue in tayl, which it neither did, nor intended, though well it might, such warranters having no title.

4. The Statute de Donis did not intend to restrain the Alienation of any Estates, but Estates of Inheritance upon Condition expressed or implied, such as were Fee-simples Conditional at Common Law; And therefore if Tenant for life aliened with warranty which descended upon the Reversioner, such Alienation or Warranty were not restrained by this Statute, but left at Common Law.

1. Because the Estate aliened was not of Inheritance upon Condition within that Statute.

2. He in the Reversion had his remedy by entering, for the forfeiture upon the Alienation, if he pleas'd, which the Donors of Fee-simples Conditional could not do.

These things cleared, I think it will be most manifest by the Statute de Donis, and all ancient Authority, That the warranty of Tenant in tayl, though it be a Collateral warranty, will not bar the Donor, or his Heir, of the Reversion.

After the Inconvenience before recited, That the Donees disinherited their Issue against the form of the Gift; then follows,

Et præterea cum deficienti exitu de huiusmodi Feoffatis, Tenementum sic datum ad donatorem vel ad ejus hæredes reverti debuit per formam in Charta de dono huiusmodi expressam, licet exitus, si quis fuerit obiisset per factum tamen, & Feoffamentum eorum quibus Tenementum sic datum fuit sub conditione exclusi fuerunt, hucusque de Reversione eorundem Tenementorum quod manifeste fuit contra formam doni.

Hitherto the Inconveniences and Mishchiefs which followed the Issue of the Donees, and to the Donor, when they fail'd by the Donees power of Alienation, are only recited in the Statute, without a word of restraint or remedy.

Then follows the remedy and restraint in these words only, and no other.

Propter quod Dominus Rex perpendens quod necessarium, & utile est in prædictis casibus (which comprehends both Inconveniences) apponere remedium, Statuit quod voluntas donatoris secundum formam in Charta Doni sui manifeste expressam de cætero observetur, ita quod non habeant illi quibus Tenementum, sic datum fuit sub conditione potestatem alienandi Tenementum, sic datum quo minus ad exitum illorum quibus Tenementum sic fuerit datum, remaneat

remaneat poſt eorum obitum, vel ad donatorem, vel ad ejus hæredes, ſi exitus deficiat, revertatur. Per hoc quod nullus ſit exitus omnino vel ſi aliquis exitus fuerit, & per mortem deficiet, hærede de corpore hujusmodi exitus deficiente.

1. By theſe words the Donee or Tenant in tayl is reſtrained from all power of alienation, whereby the Lands intail'd may not deſcend to the Heir in tayl after his death.

Therefore,

By theſe words he is reſtrained from alienation with warranty, which doubtleſs would hinder the Land ſo to deſcend, if it were not reſtrained by the words of the Statute.

2. By the ſame words the Donee in tayl is reſtrained from all power of alienation, whereby the Lands intail'd may not revert to the Donor for want of Iſſue in tayl.

Therefore,

By theſe words he is reſtrained from ſuch alienation with warranty, whereby the Lands may not revert to the Donor, or his Heirs, for want of Iſſue in tayl.

For the ſame words of the Statute muſt be of equal power and extent to reſtrain the Donees alienation from damaging the Donor, as from damaging the Iſſue in tayl. Otherwiſe

3. Words in an Act of Parliament, That A. ſhould have no power to hurt the right of B. nor the right of C. muſt ſignifie that A. ſhall have no power to hurt the right of B. but ſhall have ſome to hurt the right of C. which is that A. by his warranty ſhall not harm B. but may by his warranty harm C.

4. If it be ſaid, The Statute reſtraining not the alienation by warranty, as to the Iſſue in tayl, the Iſſue would have no benefit by the Statute; For it is as eaſie for the Donee or Tenant in tayl to alien with warranty (and ſo to deprive the Iſſue of all benefit of the Statute) as to alien without warranty.

But his warranty can ſeldom deſcend upon the Donor, and therefore cannot be ſo hurtful to him as to the Iſſue in tayl. How doth this ſatisfie the equal reſtraint of the Statute from harming the Donor, or the Iſſue in tayl? For,

This Logick and Reasoning is the ſame as to ſay, A. by expreſs words is reſtrained from beating B. or beating C. but A. hath more frequent opportunities of beating B. than of beating C. Therefore the ſame words reſtrain A. from beating B. at all.

But

But not from beating C. when opportunity is offered.

5. In the next place, admit the words of restraint in the Statute de donis had been, Rex Statuit quod voluntas donatoris in Charta doni sui expressa de cetero observetur, ita quod non habeant illi quibus Tenementum, sic fuit datum sub Conditione potestatem alienandi Tenementum sic datum per Warrantiam, vel aliter, quo minus ad exitum eorum remaneat vel ad donatorem revertatur.

It had then been clear to every understanding, That the warranty of the Donee or Tenant in tayl, by the express words of the Statute, did neither barr the Donor, nor the Issue in tayl (for words more express were not inventable to restrain the Donees warranty from barring them) and then observe what consequents had been rightly deduc'd from such restraint made by the Statute.

The Statute expressly restrains the warranty of Tenant in tayl from barring his Issue, whence it follows, That by the Statute the Issue in tayl is not barr'd by the Lineal warranty of Tenant in tayl, because his warranty upon the Issue in tayl cannot possibly be any other than a Lineal warranty.

It might be said in like manner, the Statute de donis restrains the warranty of Tenant in tayl from barring the Donor, or his Heir of the Reversion, the consequent thence deducible had been, That the Statute had restrain'd the Collateral warranty of Tenant in tayl from barring the Donor, or his Heirs; because his warranty falling upon the Donor, or his Heir, could be no other than a Collateral warranty.

Now it is true, the word (warranty) is not in syllables within the restraint of the Statute, but is necessarily implied in it, else the Issue in tayl would be barr'd by the warranty of Tenant in tayl, without Assets, contrary to all the Current of our Books from the making of the Statute.

But those general words of the Statute restraining the Donees power of alienation in express terms, equally & pari passu for the benefit of the Donor, as for the benefit of the Issue in tayl, can never be understood to restrain the warranty of Tenant in tayl only for the benefit of the Issue in tayl, but not at all for the benefit of the Donor, but the Statute must necessarily restrain his warranty indefinitely from hurting either, and by consequent his Lineal warranty is restrained from hurting the Issue, and his Collateral warranty from hurting the Donor,

Donor, to whom his warranty can never be but Collateral, as it can never be but Lineal to the Issue in tail.

And if it be necessarily understood and implied in the Statute, the operation must be the same as if it had been syllabically inserted in the Statute.

Then to say by the restraint of the Statute, the Donees have not power to alien the Land intayl'd, quo minus ad exitum illorum remaneat post eorum mortem; but they have power to alien quo minus ad donatorem revertatur deficiente exitu, is to make the Statute contradictory to it self; which saith,

Non habeant de cetero potestatem alienandi quo minus ad exitum illorum remaneat vel ad donatorem, vel ejus hæredes revertatur deficiente exitu.

6. Again, if the Statute had provided only for indemnity of the Issue in tail, omitting the Donor and his Heirs, by the words, Non habeant de cetero potestatem alienandi quo minus Tenementum sic datum ad exitum illorum remaneat post obitum eorum. The Donees warranty had been restrain'd (as it is) to bar the Issue.

And if it had only provided for the indemnity of the Donor and his Heirs, omitting the Issue, by the words, Non habeant potestatem alienandi quo minus Tenementum sic datum ad Donatorem vel ad ejus hæredes revertatur deficiente exitu, must not his warranty have been restrain'd from barring the Donor and his Heirs in like manner?

Why then the restraint reaching to both (Issue and Donor) must not both have like benefit of it?

And for further Answer to that thin Objection, That the Statute did not provide against the Donees warranty, falling on the Donor or his Heirs, because it can fall on them but seldom, and that Laws provide against illis quæ frequentius accidunt.

It is true, when the words of a Law extend not to an inconvenience rarely happening, and do to those which often happen, it is good reason not to strain the words further than they reach, by saying it is casus omisus, and that the Law intended quæ frequentius accidunt.

But it is no reason, when the words of a Law do enough extend to an inconvenience seldom happening, that they should not extend to it as well as if it happened more frequently, because it happens but seldom. For,



By that Reason, if Lands be given to a man, and the Heirs of his body, his warranty should not barr the Issue in tail within the meaning of the Statute, because there his warranty must always fall upon the Issue in tail; but if given to him, and the Heirs females of his body, it should barr, because it falls less frequently upon such Heir female, which is absurd.

7. The Statute further commands, That the Donors Will be observ'd, according to the form of his Gift expressed in his Charter, which was that if the Donee died without Issue, the Land should return to the Donor or his Heirs. Therefore such alienation is forbid which hinders the return of it according to the Charter, and consequently alienation with warranty is forbid.

I add, That the makers of the Statute well understood the use of restraining the Donees warranty from hurting the Donor, or the Issue in tail, but not possibly the use of restraining his Lineal or Collateral warranty, which were terms then useless and unknown, and therefore not in their prospect at all.

I shall now a little resume my former reasoning, for more clearing of this point.

If immediately after the Statute de Donis, Tenant in tail had made a Feoffment in Fee with warranty, which descended upon the Issue in tail, if it had been demanded, Whether that warranty barr'd the Issue in a Formedon in the Descender, it had been an unintelligible Answer to have said in that Age, That it did not barr the Issue in tail, because it was a Lineal warranty; for that had been to answer an Ignocum per multo ignotius, than which nothing is more irrational.

But the clean Answer had been, That the Donees power of Alienation was restrained in general by the Statute de Donis, and therefore his Alienation by warranty, and consequently his warranty, could not barr the Issue in tail.

In like manner if Tenant in tail had been with the Remainder over, soon after the Statute (as then it might be) and he had made a Feoffment in Fee with warranty, and dyed, and the warranty had descended upon him in the Remainder.

If it had been demanded then, Whether that warranty did barr him in the Remainder? It had been an Answer not to be understood to have said, That it did barr him, because it was a Collateral warranty.

But

But the right Answer had been, That it was the warranty of the Ancestor, descending upon the Heir, and was not restrained within the Statute de Donis, and therefore must bind him in the Remainder of Common Course.

So as the Doctrine of the binding of Lineal and Collateral warranties, or their not binding, is an Extraction out of mensurings, and Speculations, many scores of years after the Statute de Donis.

And if Littleton (whose memory I much honour) had taken that plain way in resolving his many excellent Cases in his Chapter of warranty, of laying the warranty of the Ancestor doth not bind in this Case, because it is restrained by the Statute of Gloucester, or the Statute de Donis, and it doth bind in this Case, as at the Common Law, because not restrain'd by either Statute (for when he wrote there were no other Statutes restraining warranties, there is now a third 11 H. 7.) his Doctrine of warranties had been more clear and satisfactory than now it is, being intricated under the terms of Lineal and Collateral; for that in truth is the genuine Resolution of most, if not of all his Cases: for no mans warranty doth bind, or not, directly, and a priori, because it is Lineal or Collateral; for no Statute restraining any warranty under those terms from binding, nor no Law institutes any warranty in those terms; but those are restraints by consequent only from the restraints of warranties made by Statutes.

### Objections.

On the other side was urg'd Sir Edward Coke's Opinion upon Sect. 712. of Littleton, and his Comment upon the Statute de Donis (which is but the quoting of his Littleton) where his words are,

The warranty of the Donee in tail, which is Collateral to the Donor or him in Remainder being heir to him, doth bind them without any Assers: for though the Alienation of the Donee, after Issue, doth not barr the Donor (which was the Mischiefe provided for by the Act) yet the warranty being Collateral, doth barr both of them, because the Act restraining not that warranty, but it remaineth at Common Law.

Cok: Litt.  
Sect. 712.

These words may have a double meaning, though the alienation of the Donee doth not barr the Donor (which was the mischief provided for by the Act) yet the warranty being Collateral doth barr.

If the meaning be, That the warranty is a thing Collateral to the Alienation against which provision was made, and therefore the warranty was not restrained, but the Alienation was.

By the same reason, and in the same words, it may be said, The Alienation of the Donee doth not barr the Issue in tail (which was the mischief provided for by the Act) yet his warranty, which is a thing Collateral to the Alienation, doth barr, because it remains at Common Law.

So as this Reason concludes equally, That the Lineal warranty of Donee in tail should barr his issue, as that his Collateral warranty should barr the Donor.

Another meaning of his words may be, having first asserted that the Collateral warranty of the Donee doth barr the Donor descending upon him, and giving the reason of it, he gives no other but this, For though the Alienation of Donee in tail doth not barr him, yet the warranty, being a Collateral warranty, doth barr him; which is idem per idem, and the same as if he said, The Collateral warranty of Donee in tail doth barr the Donor and him in Remainder; for the warranty being Collateral, doth barr both of them; which is no reason of his Assertion, but the same Assertion over again. And where it follows, For the Act restraineth not that warranty, viz. the Collateral, no more doth the Act restrain the Lineal warranty in express terms, or by any Periphrasis, more than it doth the Collateral, but restrains all power of Alienation in prejudice of the Issue of Donor, and consequently the power of Aliening with warranty to the hurt of either.

2. The second thing objected was Littleton's own Authority in the same Sect. 712. his words are,

He that demandeth Fee-tail by Writ of Formedon in Descent, shall not be barr'd by Lineal Warranty, unless he hath Assents by descent in Fee-simple by the same Ancestor that made the warranty. But saith not he that demandeth Fee-tail by Formedon in Remainder, shall not be barr'd, quod nota as to the Case, Sect. 719. But Collateral warranty is a barr to him that demandeth Fee, and also to him that demandeth Fee-tail, without any other descent of Fee-simple. Whence it was concluded, That the

the Collateral warranty muſt barre the Donor without Aſſets, who demands a Fee-fimple. But

Littleton's words end not there, but immediately follow, Except in Caſes which are reſtrain'd by the Statutes, in the plural number; which words taken in, as Littleton's Caſe is, make his Authority directly for me.

For when Littleton wrote, there were but two Statutes which reſtrain'd any warranty from binding, as at Common Law, namely the Statute of Gloceſter and Weſtmiſter the ſecond, de Donis; now there is a third, 11 H. 7. c. 20.

So as thoſe words of Littleton are the ſame as if he had ſaid, Except in Caſes reſtrain'd by the Statutes of Gloceſter and Weſtmiſter the ſecond, de Donis.

Whence it follows, That by Littleton both Statutes did reſtrain ſome Collateral warranties, but the Statute de Donis reſtrains no other than the Collateral warranty of the Donee deſcending upon the Donor, it leaving all other Collateral warranties as at the Common Law. Ergo it doth reſtrain that, which is the ſolution of the Queſtion, and according to Littleton.

I have examined ſeveral Editions of Littleton, and the words are the ſame in all, Si non in Caſes reſtrained per les Eſtatutes.

No man will ſay, that by thoſe words, Except in Caſes reſtrained by the Statutes, Littleton meant Statutes that were not then made, nor perhaps never would be.

For that were to make him ſay in inſtructing his Son (for, and to whom he writ his Books) what the Law was.

But a Collateral warranty doth bind both for Fee and Fee tayl, except in Caſes reſtrain'd by Statutes, yet to be made, and which perhaps never will be made: Beſides the words reſtrain'd per les Eſtatutes by the Statutes, always denote Statutes which ſignally are, and not which are not.

3. The third Objection was from Littleton, Sect. 716. where it is ſhew'd the Collateral warranty of Tenant in tayl doth bind him in Remainder in tayl, which is agreed; for the Statute de Donis reſtrains not the warranty of Donee in tayl deſcending upon him in Remainder, as hath been cleared.

4. The fourth Objection was the Caſe of 41 Ed. 3. Fitz. tit. Garrany pl. 16. whence it was urg'd as Juſtice Herles Opinion, and by him ſpoken.

1. That



1. That he was at the making of the Statute de Donis.
2. That the makers of the Statute intended that the Donees warranty should not barr a Donor, stranger in blood to the Donee; but should barr a Donor of kindred to the Donee.

This Case is of no Credit in several respects. For,

1. The Statute makes no such difference of a Donor stranger, and a Donor party in blood to the Donee, as is urg'd in that Case.
2. The Statute is, That the Donors will was to be observ'd, expressed in his Charter of Gift; and if a Donor were party in blood, yet his will in his Charter might be the same as that of a stranger Donor, and was equally by the Statute to be observ'd.
3. The warranty of Donee in tail could never descend upon a stranger Donor, for such could never be his Heir, nor needed any help of the Statute against his warranty.
4. The Donor in Frank-marriage, who might be Cosen to either party married, and must be of kindred to one or both Donees, is expressly named as a Donor, wronged by the Donees alienation in the Statute: Therefore a Donor of the Donees blood was within the remedy of the Statute.
5. Nor could this be Herle's Opinion in 41 E. 2. but in the Context of the Report Finchden saith, Il est dit in terms Comment Herle que fuit un Justic, dit que il fuit al fesanc del Stat. & dit as befoze.

And for that the name of Herle is written in the Report in large Letters, as the Judges Names use to be, it was mistaken at the Barr, as if the Context had begun, Herle que fuit un Justic dit, which could not then be an Opinion of Herles. For if he were at the making of the Statute de Donis, 13 E. 1. he could not then be less than Four and twenty, or Five and twenty years old, and must have liv'd after until 41 E. 3. above Eighty years. But the truth is, he died in, or soon after, 7 E. 3.

So it is not Herle's Opinion, but Finchden saith, It is said in Terms, that is, of the Year Books, how Herle, who was a Justice, said, He was at the making of the Statute which was made to redress the Mischief to the Donor, who was a stranger; And therefore he said that the Donor in the Case being no stranger, he saw no reason why he should not be barr'd, being out of the

the mischief of the Statute, but gave no Rule, but the Debate was adjourn'd.

Another Reason proving this, is, That it is said, Herle que fuit un Justice, which no Reporter ever said of a Justice at present, and reporting his Opinion.

What Finchden said is groundd upon what he had heard was said by Herle in former terms. But no such Opinion of Herles appears any where, but the contrary clearly in several places.

The Reporter, at the end of the Case, hath vid. 5 E. 3. O-  
pinion Herle que le warranty le Ten.in tayl, n'est pas barr al doner  
pour ceo que le statut reherse le mischief quod Donatores fuerunt  
exclusi de Reversionibus hucusque, & les heires disherit issint à  
restrainer tiel point fuit le stat. de Donis Conditionalibus, fait  
quod voluntas donatoris observetur. Here is Herle's own Op-  
inion expressly contrary to what Finchden by hearsay only said  
it was.

In another Case upon question, Whether the warranty of Te-  
nant in tayl barr'd him in Remainder? Herle saith, Le statute voet  
que ceux as queux les Tenements sont done, ne eient power de a-  
lienation quo minus il descendra al issue, ou retorn al Donor, & in  
ceo point le statute voet que le volunt del donor in omnibus obser-  
vetur mes le statute, ne parle riens de cestuy in le Remainder, and  
so rul'd.

Here is the Opinion of Herle in another Case, That the  
warranty of the Donee in tayl barr'd not the Issue in tayl, nor  
the Donor, by the Statute, but barr'd him in Remainder, as  
not aided by the Statute.

In a question, Whether the King were barr'd by the warran-  
ty of Tenant in tayl, his Ancestoz for a Reversion descended to  
him, with Assets? Herle gives his Opinion as known Law  
then, Vous sages bien que de ley cestuy que demand per Formedon  
in Reverter, ne serra barr per le garranty, cestuy à que les Tene-  
ments fuerunt done in tayl, sil ne eyt per descent tout soit il heire à  
luy, & le quel Roy ad per descent ou non, ne potomus enquire.  
And on this Case Sir Edward Coke makes an Observation,  
That the King was not bound by a Collateral warranty for the  
Reversion of an Estate in tayl, no more is any other Donor,  
by that Case.

7 E. 3. f. 34.  
Fitz. Garra-  
7 P. 44.

Fitz. 7 E. 3.  
f. 48. p. 46.

Fitz. p. 61.  
Garranty.  
6 E. 3. f. 36.

So as Sir William Herle's Judgment, who was then Chief Justice of the Common Pleas in three several years, and several Cases, was directly contrary to what Finchden, 41 E. 3. said it was upon Report.

Besides the contrary of what my Brother Ellis urg'd from this Case, may be thus inferr'd out of it: This Case admits that the Statute restrains the warranty of the Donee from barring some Donor, viz. a Donor stranger in blood, as was said; for it restrains Alienation without warranty against all Donors, but the Statute did not restrain the Donees warranty from barring such a Donor, for his warranty could never descend upon a stranger, and the Statute did not restrain a thing which could not be: Therefore, ex concessio, the Statute restrained the Donees warranty from barring the Donor of blood to the Donee.

7 E. 3. 34 p. 44. 5. The fifth Objection was a Case 7 E. 3. that Tenant in tail made a Feoffment in Fee, and died issueless, and the Feoffee rebutted the Donor by the warranty.

This Case rightly understood is not to the purpose, for the Donor was not rebutted by the warranty of Tenant in tail (which is the present question) but by the Donors own warranty.

The Case was, That A. gave Land to W. and E. his wife, Habendum prædictis W. & E. & hæredibus inter se legitime procreatis, and warranted those Tenements to the said W. & E. & hæredibus eorum seu assignatis. The Heir in tail made a Feoffment in Fee, and died, leaving no Issue inheritable, and the Donor was rebutted in his Formedon in Reverter by his own warranty, having warranted to the Donee, his Heirs and Assigns, and the Feoffee claimed as Assignee. And it was adjudg'd against the Donor after in the same year, as appears 46

46 E. 3. f. 4. b. E. 3. f. 4. b. and there admitted good Law.

But Sir Edward Coke denies this Case to be Law now, saying, That the warranty determined with the Estate tail, to which it was first annexed; and doubtless it did so as to Voucher, but whether as to Rebutter of the Donor, the party rebutting having the Land, though another Estate in it, and deriving the warranty to himself, as Assignee, is not clear.

6. A first Objection was made from a Case 27 E. 3. f. 83. <sup>27 E. 3. f. 83. pl. 42.</sup> of a Forfeited in Reverter brought, and the Deed of Tenant in tail; Ancestor to the Demandant, shewed forth, but the Book mentions no warranty; but it is like it was a Deed with warranty, and the Plaintiff durst not demur, but traversed the Deed, as any would avoid demurring upon the validity of an Ancestor's Deed, when he was secure, there was no such Deed of the Ancestor.

7. The last Objection was a Case 4 E. 3. f. 56. p. 58. <sup>4 E. 3. f. 56. pl. 58.</sup> where Tenant in tail made a Feoffment with warranty, and the warranty descended upon him in the Remainder in tail, which barr'd him, which is a Case agreed, as before: For the Statute of Westminster the second, provides not at all for him in Remainder; but as to him, Tenant in tail's warranty is left as at Common Law.

In 4 E. 3. a Forfeited in the Descender was brought by the Issue in tail, and the Release of his elder Brother, with warranty, was pleaded by the Tenant Stoner, who gave the Rule in the Case: Le statute restraynes le power del Issue in tail, to alien in prejudice of him in the Reversion, by express words and à Fortiori, the power of the Issue in tail is restrain'd to alien in prejudice of the Issue in tail. <sup>4 E. 3. f. 28. pl. 57.</sup>

Whereupon the Tenant was rul'd to answer, and pleaded Assent descended.

Here it was admitted, the Issue in tail could not alien with warranty in prejudice of the Reversioner: And in 10 E. 3. soon <sup>10 E. 3. f. 14; pl. 53.</sup> after a Forfeited in Reverter being brought, and the warranty of Tenant in tail pleaded in barr. Scot alleg'd the restraint of the Statute as well for the Reversioner as for those claiming by descent in tail. The same Stoner demanding if the Ancestors Deed was acknowledg'd, and answered it was; His Rule was, That the Judgment must be the same for the Reversioner as for the Issue, in these words; Ore est tout sur un Judgment, which can have no other meaning, considering Scot's words immediately before, that the Law was the same for the Reversioner, as for the Issue in tail, and Stoner's Opinion in the Case before to the same effect, 4 E. 3.



## Objections from Modern Reports.

Moore f. 96.  
pl. 237.

In Moore's Reports this Case is, A man lets'd of Land, having Issue two Sons, devis'd it to his youngest Son in tayl; and the eldest Son died, leaving Issue a Son; the youngest aliened in Fee with warranty, and died without Issue, the Son of the eldest being within age: If this Collateral warranty shall bind the Son within age, without Assets, notwithstanding the Statute of Westminster the second? was the question?

And the Opinions of Plowden, Bromley Solicitor, Manwood and Lovelace, Serjeants, and of the Lord Dyer and Carlin Chief Justice, were clear, That it is a Collateral warranty, and without Assets did barr, notwithstanding his Monage, for that his Entry was taken away. And this was the Case of one Evans, 12 & 13 of the Queen, as it was reported to me.

This Opinion makes against me, I confess, but give it this Answer.

1. This Case is not reported by Sir Francis Moore, but reported to him, non constat in what manner, nor by whom.
2. It was no Judicial Opinion, for Plowden, Bromley Solicitor, two Serjeants, Manwood and Lovelace, are named for it, as well as Dyer and Carlin, who were then Chief Justices of the several Courts, which proves the Opinion not only extra-judicial, but not given in any Court.
3. The motive of their Opinion was, because the warranty was Collateral, which is no true reason of the binding, or not, of any warranty.
4. An extra-judicial Opinion given in, or out of Court, is no more than the Prolatum or saying of him who gives it, nor can be taken for his Opinion, unless every thing spoken at pleasure, must pass as the speakers Opinion.
5. An Opinion given in Court, if not necessary to the Judgment given of Record, but that it might have been as well given if no such, or a contrary, Opinion had been broach'd, is no Judicial Opinion, nor more than a gratis dictum.

But an Opinion, though Erroneous, concluding to the Judgment, is a Judicial Opinion, because delivered under the Sanction of the Judges Oath, upon deliberation, which assures it is, or was, when delivered, the Opinion of the Deliverer.

Yet if a Court give Judgment judicially, another Court is not bound to give like Judgment, unless it think that Judgment first given was according to Law.

For any Court may err, else Errors in Judgment would not be admitted, nor a Reversal of them.

Therefore, if a Judge conceives a Judgment given in another Court to be erroneous, he being sworn to judge according to Law; that is, in his own conscience ought not to give the like Judgment, for that were to wrong every man having a like cause, because another was wrong'd before, much less to follow extra-judicial Opinions, unless he believes those Opinions are right.

The other Case is in Goke, 5 Car. Salvin versus Clerk, in Ejection upon a special Verdict; Alexander Sidenham Tenant in tail to him and the Heirs males of his body, the Reversion to John his eldest Brother, made a Lease for three Lives, warranted by the Statute of 32 H. 8. c. 28. with warranty. And after 16 Eliz. levies a Fine with warranty and proclamations to Taylor, and dies without Issue male, leaving Issue Elizabeth his Daughter, Mother to the Plaintiffs Lessee. In 18 Eliz. the Lease for Lives expired. In 30 Eliz. John the elder Brother died without Issue, the said Elizabeth being his Heir and Heir. The Defendant entered, claiming by a Lease from Taylor, and Points entered upon him as Heir to Elizabeth.

A question was mov'd upon a suppos'd Case, and not in fact within the Case, Whether if the Fine had not been with proclamation (as it was) and no Non-claim had been in the Case (as there was) this warranty should make a discontinuance in Fee, and bar Elizabeth, it not descending upon John after Alexanders death, but upon Elizabeth, who is now also John's Heir, or determined by Alexander's death.

The Judges were of opinion, as the Reporter saith, That the warranty did bar Elizabeth, and consequently her Heir, because the Reversion was discontinued by the Estate for Lives, and a new Fee thereby gain'd, and the Reversion displac'd thereby, and the warranty was annex'd to that new Fee. But this Case is all false, and misreported.

1. For that it saith the Lease for Lives was a discontinuance of the Reversion, & thereby a new Fee gain'd to Tenant in tail, which he passed away by the Fine with warranty, which could not be; for in the Case it appears the Lease was warranted by the Stat. of 32 H. 8 and then it could make no discontinuance, nor no new Fee of a Reversion could be gain'd, and then no Estate to which the warranty was annex'd, and so was it resolv'd 40 Eliz. Keen & Copes Case. 602. pl. 13.

D D D 2

2. That

2. That Opinion was extra-judicial, it being concerning a point not in the Case, but suppos'd.

3. That Case was resolv'd upon the point of Non-claim, and not upon this of the warranty, which was not a point in the Case.

4. Some of the Judges therefore spoke not to that point, as appears in the Case.

As to the second Question, Admitting the warranty of Tenant in tail doth bind the Donor and his Heirs, yet in regard the Defendant, Tenant in possession, cannot derive the warranty to her self, from the Feoffees, as Assignee, or otherwise, whether she may rebutt the Demandants, or not, by her possession only? is the question; and I conceive she may not, as this Case is.

I shall begin with those Authorities that make, and are most press'd against me, which is the Authority of Sir Edward Coke in Lincoln Colledge Case, in the third Report, and from thence brought over to his Littleton, f. 385. a.

His words in Lincoln Colledge Case, f. 63. a. are, He which hath the possession of the Land shall rebutt the Demandant himself, without shewing how he came to the possession of it; for it sufficeth him to defend his possession, and barr the Demandant, and the Demandant cannot recover the Land against his own warranty. And there he cites several Cases, as making good this his Assertion.

In the same place he saith it is adjudg'd, 38 E. 3. f. 26. That an Assignee shall rebutt by force of a warranty made to one and his Heirs only.

This Doctrine is transferred to his Littleton, in these words, If the warranty be made to a man and his heirs without this word Assignes, yet the Assignee or any Tenant of the Land may rebutt. And albeit no man shall vouch, or have a Warrantia Chartæ, either as party Heir or Assignee, but in privy of Estate, yet any one that is in of another Estate, be it by disseisin, abatement, intrusion, usurpation, or otherwise, shall rebutt by force of the warranty, as a thing annex'd to the Land: which sometimes was doubted in our Books, when as in the Cases aforesaid, he that rebutteth claimeth under, and not above the warranty.

I shall clearly agree, no man shall vouch, or have a warrantia Chartæ, who is not in in privy of Estate, that is, who hath not the same Estate, as well as the same Land, to which the warranty was annexed: And the reason is evident, because the Tenant must recover if the Land be not defended to him by the

the warrantor, such Estate as was first warranted, and no other, unless a Fee be granted with warranty only for the life of the Grantee or Grantor, in which Case the Grantee, upon voucher, recovers a Fee, though the warranty were but for life.

I shall likewise agree the Law to be as Sir Edward Coke saith in both places, if his meaning be that the Tenant in possession, when he is impleaded, may rebutt the Demandant, without shewing how he came to the possession which he then hath, when impleaded, be it by disseisin, abatement, intrusion, or any other tortious way: And for the reason given in Lincoln Colledge Case, That it sufficeth that the Tenant defend his possession: But if his meaning be, that the Tenant in possession need not shew that the warranty ever extended to him, or that he hath any right to it, then I must deny his Doctrine in Lincoln Colledge Case, or in Littleton, which is but the former there repeated to be Law.

For as it is not reasonable a man should recover that Land which he hath once warranted to me, from me, what title soever I have in it at the time when he impleads me.

So on the other side, it is against reason I should warrant Land to one who never had any right in my warranty. And the same reason is, if a man will be warranted by Rebutter, he should make it appear how the warranty extends to him, as if he will be warranted by Voucher, for the difference is no other, than that in the case of Voucher a stranger impleads him in case of Rebutter, the Warrantor himself impleads him, and in a Voucher he must make his title appear to be warranted, Ergo in a Rebutter. But he needs not have like Estate in the Land upon a Rebutter as upon Voucher, which is for the reason given of recovering in value.

And the only reason why the person, who is to warrant, impleading the Tenant of the Land, shall not recover, but be rebutted by the warranty, is because if he should recover the Land, the Tenant, who is intitled to the warranty, must recover in value from him again, and therefore to avoid Circuit of Action, he shall not recover, but be rebutted and barr'd, as is most reasonable.

I shall therefore first make it appear by all ancient Authorities, That the Tenant in possession shall not rebutt the Demandant by the warranty, without he first make it appear that the warranty did extend to him as Heir or Assignee.

To



To prove this are full in the point,

Hill. 8 E. 3. f.  
10. tit. garran-  
y pl. 48.  
New Edit. f.  
283. b. num. 28

The Book of 8 E. 3. f. 10. of the Old Edition Hillary Term, tit. Garranty, pl. 48. where upon a great Debate it was rul'd, That the Tenant must shew how he was entitled to the warranty, and how it extended to him, and accordingly did so before his Plea was admitted by way of Rebutter.

10 E. 3. f. 42. b.  
New Edit. f.  
391. b. num. 42

Another Book full in the point, is 10 E. 3. f. 42. b. of the Old Edition, where in like manner the Tenant was forc'd to shew how the warranty extended to him upon Debate: and it is remarkable in that Case, That his shewing the Deed of warranty to him, whose Assignee he was, and the Deed of Assignment to himself was not enough, but he was compell'd to plead orally, as the manner then was; That William, who had the warranty assign'd to him by his Deed there shew'd forth, and the reason given that the Deed of Assignment could not speak and make his Plea, and was but Evidence of the truth of his Plea.

But in that very Case, when it was replyed, That he was not Tenant by the Assignment of William, but by disseisin of the Plaintiff, it was not permitted without traversing the Assignment of William: For if he were once intitled to the warranty, what Estate soever he had when impleaded, he might rebutt, though he could not vouch. Which Case proves fully both my Positions, That a man cannot rebutt without shewing how the warranty extends to him.

2. That so doing, he may, whatever Seisin he hath at that time, be it by Disseisin, or Abatement, &c. or otherwise.

22 Aff. pl. 88.

A third Case is, when the Tenant being impleaded, plead- ed the warranty of the Demandants father to one A. and bound him and his Heirs to warrant to A. his Heirs and Assigns, and that he was Assignee of A. and demanded Judgment. In that Case, because he did not plead that he was Assignee of A. by Deed, the Plea was disallow'd (which since hath been thought not necessary) but a fortiori if he had plead- ed no Assignment at all from A. by Deed, or without Deed, to intitle him to the warranty, his Plea had been necessarily dis- allowed.

My next Assertion is, That the Tenant in possession setting forth how the warranty extends to him, needs not set forth by what Estate or Title he is in possession.

To this I shall cite three Books full in the point.

But in all these Cases it is to be noted, That the Tenant rebutting, though he was in possession of another Estate than that to which the warranty was annex'd; yet constantly shew'd how the warranty was deriv'd to him, which Sir Edward Coke observ'd not, either in Lincoln Colledge Case, or his Littleton, but cites in Lincoln Colledge Case the Case of 45 E. 3. and some others I shall mention after, to shew a man may rebutt, being in of another Estate than that which was warranted, which is true, but not without intitling himself to the warranty.

That the Law of rebutting stands upon the difference I have taken, besides the Authorities urg'd, will be evident for these Reasons.

As a warranty may be created, so may it be determin'd or extinguish'd various ways.

1. It may be releas'd, as Littleton himself is Sect. 748.
2. It may be defeasanc'd, as Sir Edward Coke upon that Sect. 748.
3. It may be lost by Attainder, Sect. 745.
4. It may be extinguish'd by Re-foffment of the warrantor or his Heirs, by the Garrantee or his Heir.

In all these Cases, if the warranty be destroy'd, it cannot be rebutted; for there cannot be an accident to a thing which is not, and rebutting is an accident incident to a warranty: And therefore if the warranty have no being, there can be no rebutter.

Why then admit A. warrants Land to B. and his Assigns, during the life of B. after B. releases this warranty to A. and then Assigns to C. C. is impleaded by A. and pleads generally that A. warranted to B. for his life, and that B. is still living, if C. could rebutt A. by this manner of pleading, without shewing when B. assigned to him, so to derive the benefit of the warranty to himself, A. could never have benefit of the Release of the warranty, because it could not appear whether the warranty were releas'd before or after the assignment; if before, then the warranty is gone, and cannot be rebutted, but if after, it may.

6 E. 3. f. 7. old  
Edit. new E.  
dit. 6 E. 3. f. 187  
Num. 16.  
10 E. 3. f. 42.  
cited before  
old Book.  
45 E. 3.

45 E. 3. f. 18.

. So if A. binds him and his Heirs to warrant to B. his Heirs and Assigns, B. dyes, his Heir releases the warranty, and dies, and then the Heir of the Heir assigns: The Tenant is impleaded by A.

If he may rebutt by his bare possession without shewing how the warranty extended to him, A. can have no benefit of his Release before any assignment was made; for the Demandant cannot be suppos'd to know the time of the assignment, and consequently cannot know how to plead the Release, until the time of the assignment appear, which is most consonant in reason with the Authorities before urg'd.

Another reason is, That constantly, in elder times, when the Tenant pleaded a warranty to rebutt, he concluded his Plea, that if he were impleaded by a stranger, the Demandant was to warrant him, which could not be without shewing how the warranty extended to him; for he was not to warrant him, if impleaded by a stranger; because he had possession of the Land only.

Sir Edward Coke in Lincoln Colledge Case, cites the Book of 38 E. 3. f. 26. as adjudg'd to prove that the bare possession of the Land is sufficient for the Tenant to rebutt, for that the Assignee may rebutt a warranty made only to a man and his Heirs: If that were so, it were to his purpose; but there is no such Case in 38 E. 3. f. 26. but the Case intended is 38 E. 3. f. 21. and he quotes the folio truly in his Littleton.

But the Case is not, That an Assignee may rebutt, or have benefit of a warranty made to a man and his Heirs only, but that a warranty being made to a man, his Heirs and Assigns, the Assignee of the Heir, or the Assignee of the Assignee, though neither be Assignee of the first Grantor of the warranty, shall have like benefit of the warranty, as if he were Assignee of the first Grantor, which hath been often resolv'd in the old Books.

To the same purpose he cites a Case out of 7 E. 3. f. 34. & 26 E. 3. f. 4. which doth but remember that of 7. as adjudg'd, That the Assignee of Tenant in tail might rebutt the Donor; whence he infers, as before, that the Tenant in possession might rebutt without any right to the warranty: But the Inference holds not from that Case.

The

The Case of 7 E. 3. was, That Land was given in taylor, and the Donor warranted the Land generally to the Donee, his Heirs and Assigns, the Donee made a Feoffment in Fee, and died without Issue; and the Donor impleading the Feoffee was rebutted, because he had warranted the Land to the Donee, his Heirs and Assigns, and the Feoffee claimed as Assignee of the Donee, and therefore rebutted, not because he had a bare possession. But this Judgment of 7 E. 3. Sir Edward Coke denies (and perhaps justly) to be Law now, because the Estate taylor being determin'd to which the warranty was first annex'd, the whole warranty determin'd with it.

But however, the Case no way proves what it is alleg'd for in Lincoln Colledge Case, That a man may rebut without ever shewing the warranty extended to him, for the Feoffee did in that Case shew it: So in the Case 45 E. 3. f. 18. the Feme, who rebutted, shew'd she was Grantee of the warranty.

To this may be added, That what is deliver'd, as before, in Lincoln Colledge Case, is neither conducing to the judgment given in that Case, nor is it any Opinion of the Judges, but is Sir Edward Coke's single Opinion, emergently given, as appears most clearly in the Case.

To conclude,

When the Feoffees were seisd to the use of William Vesey for his life, and after to the use of the Defendant, his wife, for her life, and after to the use of the right Heirs of William Vesey.

And when by Operation of the Statute of 27 H. 8. the possession is brought to these uses, the warranty made by William Vesey to the Feoffees and their Heirs, is wholly destroy'd.

For if before the Statute the Feoffees had executed an Estate to William for life, the Remainder to his wife for life, the Remainder to his right Heirs.

The warranty had been extinguish'd by such Execution of Estate, and releas'd in Law, for it could be in none but in William and his Heirs, who could not warrant to himself, or themselves. By Littleton Sect. 743. for his Heirs, in such Case, take not by Purchase, but Limitation, because the Freehold was in him with a Remainder over to his right Heirs, and so hath as great an Estate in the Land as the Feoffees had, and then the warranty is gone by Littleton.

Lin. Sect. 744.

C e e

And



And now the Statute executes the possession in the same manner, and the warranty is in none, for the time present or future, but exting: If the warranty had been to the Feoffees, their Heirs and Assigns, it might have been more colourably question'd, Whether the mean Remainder were not an Assignee of the Feoffees, and so to have benefit of the warranty; but the warranty being to the Feoffees and their Heirs only, no Estate remaining in them, no Assignee can pretend to the warranty.

2. William Vesey could by no possibility ever warrant this Estate to the Defendant during his life, and where the warranty cannot possibly attach the Ancestor, it shall never attach the Heir, as by Littleton's Case: If a man deviseth Lands in Fee to another with warranty, for him and his Heirs, his Heirs shall not be bound to the warranty, because himself could never be.

And though in that Case the Estate to be warranted, commenced after the death of the Warrantor, and here the Remainder to the wife is in being before his death, yet the reason differs not; for himself could no more warrant this by any possibility than that, and his Heir might as equally warrant the Estate devis'd, as this.

Next Justice Jones in Spirt and Bences Case, cites a Case 7 Eliz. the same with this Resolution, resolved in the Common Pleas, That the mediate Remainder could not be warranted.

In this Case, if the Feoffees before the Statute had either voluntarily, or by coercion of the Chancery, after the death of the first Cestuy que use for life executed the Estate of the mean Remainder, such person in Remainder could have no benefit of the warranty, being but an Assignee of the Feoffees, because the warranty was only to them and their Heirs.

No more can the person in Remainder here, whose Estate is executed by the Statute, be warranted more than if such Estate had been executed by the Common Law.

There are another sort of persons who may rebut, and perhaps vouch, who are neither Heirs nor formally Assignees to the Garrantee, but have the Estate warranted, dispositione & instituto Legis, which I conceive not to differ materially, whether they have such Estate warranted by the Common Law, or by Act of Parliament.

The first of this kind I shall name, is Tenant by the Courte- Aff. p. 235  
sic, who, as was adjudg'd 35 Aff. might rebutt the warranty  
made to his wives Ancestor; yet was neither Heir nor formal  
Assignee to any to whom the warranty was granted; nothing is  
said in the Book concerning his vouching, but certainly the wives  
Heir may be receiv'd to defend his estate, if impleaded by a  
stranger, who may vouch according to the warranty, or may re-  
butt, as the Case of 45 E. 3. f. 18. is.

But this difference is observable also, where such a Tenant  
rebutts, it appears what claim he makes to the warranty, and so  
the Inconveniencies avoided which follow a Rebutter made up-  
on no other reason than because he who rebutts is in possession  
of the Land warranted.

A second Tenant of this kind is the Lord of a Villain, and  
therefore the Case is 22 Aff. That Tenant in Dower made a Lease 22 Aff. p. 37,  
for life to a Villain (which in truth was a forfeiture for making a  
greater Estate of Freehold than she had power to make) and  
bound her and her Heirs to warranty; the Lord of the Villain  
entred upon the Land in her life time, and before the warranty at-  
tach'd, the Heir, who had right to enter for the forfeiture, the Wo-  
ther died, and the Heir entred upon the L. of the Villain, who re-  
entred, and the Heir brought an Assise. The L. of the Villain plead-  
ed the warranty, and that the Heir, if a stranger had impleaded  
him, was bound to warrant the Estate, and therefore demanded  
Judgment if the Heir himself should implead him.

1. It is there agreed, if the warranty had attach'd the Heir be-  
fore the Lords entry, the Heir had been bound: but quere.

2. By that Book it seems the Lord, impleaded by a Stranger,  
might have vouch'd the Heir, if the warranty had attach'd him  
before the Lords entry.

But in this Case it appears, the Lord was no formal Assignee  
of the Villains, for this warranty must be as to an Assignee (for  
the Estate warranted was but for life) and the Lords Estate was  
only by order of the Law.

A third Case of this nature is, Where the Ancestor granted  
Lands to a Bastard, with warranty; but how far the warranty  
extended, as to the Heirs, or Heirs and Assigns of the Bastard, ap-  
pears not in the Case: the Bastard died without Issue, and con-  
sequently without Heir, the L. by Escheat entred, upon whom the  
Heir entred, the warranty of his Ancestor having not attach'd him  
before the Bastards death (for it seems this was in a Case where  
the Heir might have entred in his Ancestors life time, & so avoided  
his warranty, as in the former case of the L. of a Villain) by the Book

the warranty having not attach'd him during the Bastard's life, the Lord by Escheat could have no benefit of it, but if it had attach'd him, he might; *ut videtur*.

In this Case, if the warranty were to the Bastard and his Heirs only, it determined, he dying without Issue, and then there could be no Rebutter or Voucher by the Lord by Escheat, if the warranty had attach'd the Heir; but if it were to him, his Heirs and Assigns, then the Lord, whose title is by the Act and Disposition of the Law, and not as Assignee in the *per hab*, notwithstanding the benefit of this warranty; *quod nota*.

These Cases are mentioned in Lincoln Colledge Case, and in Spirt and Bences Case in Cr. 1. and in both places admitted for Law.

It seems this very unreasonable; That the warranty being an incident to the Estate warranted, should accompany it where the Law dispos'd the Estate and Land warranted to all intents.

2 In many Cases the Law disposing the Estate, if the warranty attended it not, the disposition made by the Law were in vain, for without the warranty the Estate may be necessarily avoided.

Such persons who come to the Estate, dispositione Legis, are not properly in, in the post, but they morally have the Estate by consent, both of the Warranter and Garrantee, because they have it by the Act of Law, Statute or Common, to whose disposal every man is as much consenting, and more solemnly than he is to his own private Deed.

And after this way, if the two last Cases be Law, the Cestuy que use having his Estate by operation and appointment of the Statute of Uses of 27 H. 8. may have the benefit of the warranty attending the Estate, though he be no formal Assignee or Heir to the Feoffers to use.

Many other Estates are of this kind; as Tenant in Dower, if endowed of all the Land warranted. An Occupant, Tenants by the Statute of 6 R. 2. c. 6. where the Feme consents to the Ravisher. Tenant by 4 & 5 P. M. because the ward consented to her taking away without the Guardians consent. Lands warranted, which after become forfeited to the King, or other Lords, &c.

Quere in the Cases of 22 Aff. p. 37. & 29 Aff. p. 34. Whether, notwithstanding the warranty had descended upon the Heir, while the Lands were in the possession of the Villain in the first Case, and of the Bastard in the second Case, before any entry

try made by either Lord, the Lands could have rebutted or vouch-  
ed by reason of those warranties, being in truth strangers to the  
warranty, and not able to derive it to themselves any way.

But if after the warranty descended upon the Villain or Ba-  
stard, the Villain or Bastard had been impleaded by the Peir, and  
had pleaded the warranty against the Peir, and had Judgment  
thereupon by way of Rebutter, then the Lords might have plead-  
ed this Judgment as conclusive, and making the Villains Title, or  
Bastard, good against the Peir, and the Peir should never have  
recover'd against the Lords. And this seems the meaning of  
the Book 22 Ass. p. 37. if well consider'd. Though in Spirt  
and Bences Case no such difference is observ'd.

*Cætera desiderantur.*

The Court was in this Case divided, *viz.* The Chief Ju-  
stice and Justice *Archer* for the Demandant, and Justice  
*Wylde* and Justice *Atkins* for the Tenant.







CONCERNING

# PROCESS

Out of the

COURTS at WESTMINSTER

INTO

# WALES

Of late times, and how anciently.

*Memorandum,  
These Notes  
following  
were all  
wrote with  
the proper  
hand of the  
Chief Justice  
Sir John  
Vaughan, and  
intended to  
be metho-  
dised by him,  
in order to  
be delivered  
in Court.*

**A** Man taken upon a *Latitat* in *England*, puts in two Welch men for his Bayl, Judgment passing against him, it was a Question, *Whether* after a *Capias ad Satisfaciendum* issued against the Principal, who was not to be found, *Process* might issue into *Wales*, which must be by *Scire Facias*, first against the Bayl; whereupon Mann the Secondary of the Kings Bench informed the Court that it had been so done in like Cases many times.

But the Court was likewise informed, that Brownloe, Chief Pronotary of the Common Pleas, affirmed they did not then use to send such *Process* into *Wales*, but only *Process* of Outlawry.

But

*to Jac. Bol-  
strode part 2.  
f. 54, 55. Hall  
and Rothe-  
rams Case.*

But Mann affirming that their Course was otherwise in the Kings Bench, the Court awarded Process into Wales against the Bayl, and said, If the parties were grieved, they might bring their Writ of Error.

1. This Award of the Kings Bench hath no other Foundation to justify it, than Mann's the Secondaries Information, That the like had been often done, which was his own doing possibly, and never fell under the Consideration of the Court.

2. The Court weighed it no more than to say, The parties grieved might have a Writ of Error, which by the way must be into the Parliament, so it concerned the Jurisdiction of the Court, which the Act of 27 Eliz. for Errors in the Exchequer Chamber excepts; and upon that ground any Injustice might be done, because the party wronged may have a Writ of Error.

3. Brownloe the Chief Pronotary of the Common Pleas, and a most knowing man, affirm'd no such Process issued thence into Wales, and but only Process of Outlawry.

So as this awarding of Process into Wales, upon the usage of that Court, affirmed by Mann, is counter'd by the contrary usage of the Common Pleas, affirmed by Brownloe: Therefore that Book and Authority is of no moment to justify the issuing of a Scire facias into Wales.

11 Jac. Bol-  
strode part 2.  
f. 156. 157.  
Bede v. Piper.

The next Case in time is 11 Jac. in Debt upon a Bond; the Action was laid in the County of Hereford, upon Nil debet pleaded, the Plaintiff had Judgment and Execution, and a Writ to the Sheriff of the County of Radnor, to levy Execution, who did not, but made his Return, That breve Domini Regis non currit there.

24. How an  
Action of  
Debt could  
be laid in  
Hereford, which  
must be by  
Original, un-  
less the party  
were in Offi-  
dia Mariscal,  
and declared  
upon a Bond  
in the County  
of Hereford.

Coke, the Chief Justice, said, before the Statute of 27 H. 8. c. 26. which annexed Wales and England, doubt might have been in that Case; but since the Statute 27 H. 8. it was clear, and grounded himself upon a Case in 13 E. 3. of which more anon: In this Case the Court did agree, That the Writ of Execution did well go into Wales, and amerced the Sheriff 10 l. for his bad Return.

In this Case Dodridge agreed with Coke, and said, If the Law should be otherwise, all the Executions in England would be defeated.

This was a Resolution upon some Debate among the Judges of the Court, but upon no Argument at Bar for any thing appearing.

Per

Per Doderidge, If Debt be brought against one in London, and after the Defendant removes, and inhabits in Wales, a Capias ad satisfaciendum may be awarded against him into Wales, or into any County Palatine, and this was his Opinion exactly in the former Case.

16 Jac. B.R.  
Croke 424.

But as the course of the Common Pleas was alledged to be contrary to what Mann said was used in the King Bench, in the Case of Hall & Rotheram, 10 Jac. before cited so.

It was in the same year 11 Jac. wherein the Kings Bench resolved, That Execution did well issue to the Sheriff of the County of Radnor of a Recovery in Debt in the Kings Bench, and find the Sheriff for his Return, that breve Domini Regis non currit in Wallia.

Resolved otherwise in the Common Pleas, and that by the whole Court, That a Fieri facias, Capias ad Satisfaciendum, or other Judicial Process did not run into Wales, but that a Capias utlagatum did go into Wales; and as Brownloe, Protonotary, then said, that an Extent hath gone into Wales.

11 Jac. Godbolt f. 214.

And it is undoubtedly true, as to the Capias utlagatum and Extent, but as to all other Judicial Process into Wales, upon Judgments obtained here between party and party, hitherto there is nothing to turn the Scale: The Judgment of the Court of Common Pleas being directly contrary to that of the Kings Bench in the same age and time.

Upon occasion of a Procedendo moved for to the Council of the Marches, who had made a Decree, That some persons living in the English Counties, where they at least exercised Jurisdiction, should pay monies recovered against him at a great Sessions in Wales, he having neither Lands or Goods, nor inhabiting in Wales, having obtained a Prohibition to the Council of the Marches, the Court of the Kings Bench was against the Procedendo. And Justice Jones cited a Case where Judgment was given in the great Sessions of Cardigan, against a Citizen of London, who then inhabited there, and after removed his Goods and Person thence, that upon great deliberation it was resolved, A Certiorari should issue out of the Chancery to remove the Record out of Wales, and that then it should be sent by Mittimus into the Kings Bench, and so Execution should be awarded in England of the Judgment had in Wales. If this were so, for which there is no other Authority but that Justice Jones cited such a Case, not mentioning the time, I agree it would seem strange, that a Judgment obtained in Wales should by Law be executed in England, and that a Judgment obtained in England, could not be executed in Wales.

Bendloes  
Rep. 2 Car. 1.  
Term. Mich.  
f. 192. Beaton's  
Case.

No time is mentioned when this Resolution, cited by Jones, was, so as it probably preceded the Resolutions of the Judges in Croke.

¶ ¶ ¶

But



Cr. 2 Car. 1. f.  
346.

This Case is  
in the point  
for a *Scire  
facias* to have  
Lands in  
Wales null be  
against the  
Heir inhabi-  
ting in Eng-  
land, but ha-  
ving Lands  
in Wales.

But in the same year, in Easter Term before, at an Assembly of all the Justices and Barons, it was resolved, where Judgment was given in Debt at the great Sessions in Wales against a Defendant inhabiting there, and the Defendant dying intestate, one who inhabited in London taking Administration, that Execution could not be in Wales, because the Administrator inhabited not there, nor a Certiorari granted out of the Chancery to remove the Record, that so by *Mitimus* it might be sent to the Kings Bench or Common Pleas, to take forth a *Scire facias* upon it, to have Lands out of Wales, or Goods in the Administrators hands liable to it there.

This was the Resolution of all the Justices and Barons for these Reasons: First, by this way all Judgments given in London, or other inferior Jurisdictions, would be removed, and executed at large, which would be of great Inconvenience to make Lands or Goods liable to Execution, in other manner than they were at the time of the Judgment given, which was but within the Jurisdiction.

Secondly, It would extend the Execution of Judgments given in private and limited Jurisdictions, as amply as of Judgment given at the Kings Courts at Westminster.

By this Resolution a Judgment given in Wales shall not be executed in England, out of their Jurisdiction of Wales, and à pari, a Judgment given in England, ought not to be executed in Wales, which is out of the Jurisdiction of the English Courts, more than a Judgment given in the Kings Bench or Common Pleas, ought to be executed in Ireland, or the Islands which are out of their Jurisdiction, equally and upon the same grounds, for anything deducible from these Cases, which was never pretended that it could be done.

And by that Case of Coke, Lands, Persons, or Goods ought not to be liable to Judgments in other manner than they were at the time of the Judgment given, which was where the Court had Jurisdiction which gave the Judgment.

Nor is it material to say, the Judgments then given are of no effect, no more than to say Judgments given in the Kings Courts, are of no effect against an Irish-man, Dutch-man, or Scotch-man, that hath no Lands or Goods in England liable to Execution by that Judgment.

For the Plaintiff commencing his Suit, ought to be contentant what benefit he might have from it.

Nor

Now are Presidents of Fact, which pass sub silentio in the Court of Kings Bench or Common Pleas, in such Cases to be regarded.

For Processes issue out of the Offices regularly to the Sheriffs of the County, whereupon the Testator, the Person, Goods, or Lands, are said to be without distinction of places within or without the Jurisdiction of the Court, if the name of the County be familiar to them, as those of Wales are, but not those of Ireland.

We must then look higher, and search for surer Premises than those late Awards of the Courts at Westminster, to determine this Question.

And first it must be agreed, That when Wales was a Kingdom, or Territory governed by its own Laws, and the people subject to a Prince peculiar to themselves immediately, and not to the Crown of England, no Process, of any nature, could issue thither from the Courts of England, more than to any other Foreign Dominion that is not of the Dominion of England.

In which Assertion I neither do, nor need affirm any thing, Whether Wales were held from the Crown of England by Feodal Right, or not? and what sort of Liegeance the Princes of Wales, and from what time, did owe to the King of England? For whatever that was, yet Wales was governed by its own Laws, and not bound by any Law made in England to bind them more than Scotland was, when yet the King of Scotland did homage to the King of England for that very Kingdom of Scotland.

I begin then with the time that Wales came to be of the Dominion of the Crown of England, and was obliged to such Laws as the Parliament of England would enact purposely to bind it.

This was not before the entire Submission of Wales (de alto & basso) as the words of the Statute of Rutland are to King E. 1. which a little in time preceded the making of those Laws for Wales, called the Statute of Rutland.

Whether it was really a Statute by Parliament, or concession of the King by his Charter, for the future Government of Wales is not material (for so at least it appears to be).

But by what transaction soever, either of voluntary submission, or partly by force of Arms it was effected, it is evident, that from that time Wales became absolutely of the Dominion of the Kingdom of England, and not only of the Empire of the King of England, as it might possibly have been, for now Scotland is.

The words of the Statute of Rutland are, *Divina Providentia quæ in sui dispositione non fallitur, inter alia suæ dispensationis munera quibus Nos, & Regnum Nostrum Angliæ decorari dignata est, terram Walliæ cum incolis suis prius nobis jure feudali subjectionem, jam sui gratia in proprietatis nostræ Domin. obstaculis quibuscunque cessantibus, totaliter & cum integritate convertit, & coronæ regni præd. tanquam partem corporis ejusdem annexit & univit.*

So as from this time it being of the Dominions of the English, the Parliaments of England might make Courts to bind it; but it was not immediately necessary it should, but its former Laws (excepting in point of Sovereignty) might still obtain, or such other as E. 1. should constitute, to whom they had submitted; and accordingly their Laws, after their Submission, were partly their Old Laws, and partly New, ordained by him.

Preamble

Stat. Walliæ.

*Leges & Consuetudines partium illarum hæcenus usitatas coram nobis & proceribus Regni nostri fecimus recitari; quibus diligenter auditis & plenius intellectis, quasdam illarum de consilio procerum prædictorum delevimus, quasdam permisimus, & quasdam correximus, & etiam quasdam alias adjiciendas & faciendas decrevimus, & eas de cætero in terris Nostris, in partibus illis perpetua firmitate teneri, & Observari volumus in forma subscripta.*

Then follow the Ordinances appointing Writs Original and Judicial, in many things varying from those of England, and a particular manner of proceeding, and a particular Justiciar to administer Justice, and particular Chancery, out of which the Writs for those parts were to issue.

So as though Wales became of the Dominion of England from that time, yet the Courts of England had nothing to do with Administration of Justice there, in other manners than now they have with the Western Islands, Barbadoes, St. Christophers, Mevis, New England, which are of the Dominions of England, and so is Ireland, the Isles of Garnsey and Jersey at present, all which may be bound by Laws, made respectively for them by an English Parliament: but all, or most of them, at present

present by Laws appointed and made by the King's Letters Patents, and the King's Writs Original or Judicial from the Courts of Westminster go not there; so anciently were Gascoign, Guyen, and Calais of the Dominions of England, but governed by the Customes and Laws used there, and out of the Jurisdiction of the Kings Courts.

And it is observable, That these Territories of France were not held by the Crown of England by that right it had to all France (as is much mistaken) and particularly by Sir Edward Coke in Calvin's Case: For those Territories, by an Act and Conclusion of Peace made by E. 3. with the French, which was ratified by the Parliaments of both Kingdoms, those Territories were then annexed thereby to the Dominion of the Crown of England; whereof I had a fair and ancient Copy from Mr. Selden, but lost it by the fire.

And that Gascoign, Guyen, and Calais were of the Dominions of England and Ireland, appears by the Book 2 R. 3. f. 12.

But to all Dominions of Acquisition to the Crown of England, some Writs out of the King's Chancery have constantly run.

Sir Edward Coke, in Calvin's Case, calleth them Brevia Calvin's Case 7. Rep. f. 20. mandatoria, & non remedialia, distinguishing Writs into Brevia mandatoria & remedialia, & Brevia mandatoria non remedialia: The first sort, he saith, never issue into Dominions belonging to England, but not parts of it; the other do.

More intelligibly it may be said, That Writs in order to the particular Rights and Properties of the Subject (which he calls Brevia mandatoria remedialia) for this Writ is a Mandate, issue not to Dominions that are no part of England, but belonging to it: For surely, as they have their particular Laws, so consequently they must have their particular Mandates or Writs in order to them.

And though their Laws should by accident be the same with those of England, as hath happened to Ireland some times, and now to Wales, yet the Administration of them is not necessarily by and under the Jurisdiction of the Courts of England.

Brevia mandatoria, & non remedialia, are Writs that concern not the particular Rights or Properties of the Subjects, but the Government and Superintendency of the King, Ne quid Respublica capiat detrimenti, such are Writs for safe Conduct, and protection, Writs for Apprehension of persons in his Dominions of England, and withdrawing to avoid the Law into other of his



his Dominions, as he instances in such Writs to the Dominions of Gascoign, viz. to the Major of Bourdeaux, there to certifie concerning a person Outlaw'd in England, if he were in Servitio Regis there; of like nature are the Writs of Ne Exeat Regnum, de Leproso amovendo, de Apostata Capiendo, ad quod damnum, and Writs to call persons thence (as hath been done befoze they had Burgeses to the Parliament of England).

And Writs of Error into all Dominions belonging to England, lye upon the ultimate Judgments there given into the Kings Courts of England, to reverse Judgments, or affirm. which is the only Writ which concerns Right and Property between the Subjects that lye.

The Reasons are, First for that without such Writ, the Law appointed or permitted to such inferiour Dominion, might be insensibly changed within it self, without the assent of the Dominion Superiour.

Secondly, Judgments might be then given to the disadvantage or lessening of the Superiority, which cannot be reasonable; or to make the Superiority to be only of the King, not of the Crown of England (as King James once would have it in the Case of Ireland, *ex relatione J. Selden mihi*, whom King James consulted in this Question).

The practice hath always been accordingly, as is familiarly known by reversal or affirmance of Judgments given in the Kings Bench in Ireland, in the Kings Bench here, which is enough alone to prove the Law to be so to other subordinate Dominions.

21 H. 7. f. 3.

And it is as clear, That Writs of Error did lye in the Kings Bench to reverse Judgments in Calais (and the reason is alike) *per Curiam*, for which were divers Presidents.

This being the State of Wales, when it first became an Accession to the Dominion of England under E. 1. and when it was far from the Jurisdiction of the Courts of Justice in England, as befoze it was added to the Dominion of the Crown of England. And as other Dominions added to it were 7 H. 4. f. 14. it was questioned only, Whether a Proteſtion, *quia moratur in obsequio nostro in Wallia*, were good? because, saith the Book, it is within the Realm of England: it may be as in the Case of Bastardy, the Husband being *infra quatuor maria*, which doubtless was the Isle of Brittain, so the Primacy of Bishops in Scotland and Wales was that of England, Qu. about this, but that gives no Jurisdiction to the Courts.

There

There were two ways by which alteration might be wrought: The first by Act of Parliament in England, making Laws to change either the Laws or Jurisdictions of Wales, or both.

The second, by Alterations made in the Laws formerly by him established by E. 1. himself, and perhaps by his Successors, Kings of England, without Parliament, by a Clause contained in the Close of that Statute or Ordinance, called Statutum Wallie, in these words:

*Et ideo vobis Mandamus quod premissa de cetero in omnibus observetis, ita tantum quod quotiescunque, & quodocunque, & ubicunque nobis placuerit possimus predicta Statuta, & eorum partes singulas declarare, interpretari, addere sive diminuerere pro nostre libito voluntatis, prout securitati nostre & terre nostre predictae viderimus expediri.* This seems to extend but to the person of E. 1. and not to his Successors; and however, no such change was made by him or his Successors.

But the first remarkable Alteration made, seems to have been by Act of Parliament, and probably in the time of E. 1. who reigned long after the Statute of Wales, but the Act itself is no where extant, that I could learn. But great Evidence that such there was, which in some measure gave a Jurisdiction to the Kings Courts of England in Wales, not generally, but over the Lordships Marchers there.

This appears clearly by a Case, not much noted nor cited by any that I know, to this purpose, being out of the printed Year-Books, but printed by Fitz-herbert out of the Reports he had of E. 2. as he had of E. 1. and H. 3. all which we want wholly, though some Copies are extant of E. 2. which Case is the only light that I know to clear the Question in hand.

An Assise of Novel Disseisin was brought against C. de libero tenemento in Gowre, and the Writ was directed to the Sheriff of Gloucester, and the Plaint was made of two Comots, which is mis-printed Commons, and comprehends all Gouers-land, now part of the County of Glamorgan, by 27 H. 8. but was not so then, the Assise past against the Tenant, before the Justice assigned to take Assises in the Marches of Wales.

The Tenant brought his Writ of Error and Assignes for Error.

1. That the Writ was directed to the Sheriff of Gloucester, and the Land put in view was in Wales.

2. That

(2) That the Land was out of the Power and Bayliwick of the Sheriff of Gloucester.

(3) That the Assise ought to be taken in the County where the Land lies, and that Goures-land was in no County.

(4) That the Writ was de libero tenemento in villa, five Hamletto de Gouverse, and Gouver, was no Village or Hamlet, but an entire Country consisting of two Commots.

To these Errors assigned Scroope, then Chief Justice, made Answer,

1. That Gower is a great Barony in the Marches of Wales, and That every Barony of the Marches hath a Chancellor, and its own Writs, whereby one Tenant wronged by another may be righted: But when the Lord is outed of his intire Barony, he can have no remedy by his own Writ, for he is outed of all his Jurisdiction.

And it is repugnant to demand Justice of him whose Jurisdiction is questioned, that is, to give it, ut mihi videtur.

That therefore it was ordained by Parliament, when the Baron or Marcher is outed of his Barony in the Marches of Wales, he ought to go to the King for Remedy, and have a Writ in the Kings Chancery directed to the Sheriff of the next English County, and the Sheriff of Gloucester served the Writ, as being the next English Sheriff. This being the most material, the other Errors were also answered, and the Judgment was affirmed.

From this Case we may learn, and from no other, as I believe, at least with so much clearness, That the Summons of Inhabitants in Wales, and the tryal of an Issue there arising, should be by the Sheriff of, and in the next adjoining English County, was first ordained by Parliament, though the Act be not extant now; nor is it conceived how it should be otherwise, it being an empty Opinion that it was by the Common Law, as is touched in several Books, who knew the practice, but were strangers to the reasons of it.

For if the Law had been, that an Issue arising out of the Jurisdiction of the Courts of England, should be tryed in that County of England next to the place where the Issue did arise: not only any Issue arising in any the Dominions of England out of the Realm, might be tryed in England by that rule, but any Issue arising in any Forreign parts, as France, Holland, Scotland, or elsewhere, that were not of the Dominions of England, might, pari ratione, be tryed in the County next adjoining, whereof there is no Vestigium for the one or the other, nor suits it any way with the rule of the Law.

2. This

2. This Ordinance of Parliament extended not to all Wales, but only to the Lordships Marchers there, nor any way comprehended the ancient Shires of Wales, or Body of the Principality to which the Ordinance of the Statute of Rutland only extended: For Lordships Marchers were out of the Shires, as appears by Statute 27 H. 8.

3. It appears by the Case, that Gower was not within any County at that time.

Another Case to the same purpose is in Fitz herbert, *Title Jurisdiction*, and not in any other Reports, 13 E. 3. In a Writ of Cosenage, the Demand was of Castle of K. and Commot of J. the Defendant pleaded the Castle and Commot were in Wales, where the King's Writ runs not; and it was said that the word was not intelligible in the Courts of England, and Judgment was prayed if the Court would take Consiance.

*Fitz. Jurisdiction, 13 E. 3. pl. 23.*

To give the Court Jurisdiction, it was urged pressingly,

1. That they had given the Court Jurisdiction, by alledging the Court knew not what was meant by Commot, which the Court was to determine whether it did or not: Therefore Jurisdiction was admitted therein.

2. Parning pressed they had demanded the view, which gave the Court Jurisdiction.

3. For that the Original was directed to the Sheriff of Hereford, who by his Return had testified the Summons, and the Tenant had appeared, and so affirmed the Summons.

4. For that the view was had: Notwithstanding all which, to give the Court Jurisdiction, it was said to Parning, He must say more before the Court would have Jurisdiction. Which evidently proves that the Court had no Jurisdiction generally of Land in Wales, as I observed from the former Case. And no act of the party gives Jurisdiction to the Court, by elapsing his time to plead to the Jurisdiction, if it appear by the Record the Court hath no Jurisdiction, as in this Case it did.

Then Woodstock said, Though the Castle and Commot were in Wales, the Court ought not to be outed of Jurisdiction, for by Commot a great Signiory was demanded, consisting of Lands, Rents, and Services, and that the Castle and Commot were held in Capite of the King, as of his Crown, and said, those so held were to be impleaded here, and not elsewhere, so is 7 H. 6. f. 36. b. 7 H. 4. f. 36. b.



And said, the King by his Charter had granted the Castle and Comnot to the Tenant in tail, and thereupon pray'd aid of the King, and it was granted hereupon.

But before this was shew'd, and that it was a great Signiory, and held of the King in Capite, by which it was no part of the Principality, nor held under it, the Court would own no Jurisdiction; but when that appeared the Case was the same with the former in 18 E. 2. and the Defendant had no remedy but in the Kings Courts.

This Case was cited by Sir Edward Coke, in the Case before cited 11 Jacobi, concerning the Sheriff of Radnor, but the difference not observ'd of its being a Lordship in Wales, held immediately of the King in Capite, nor that the Court owned no Jurisdictions generally concerning Lands in Wales by the Summons and view of the next adjoining Sheriff.

William de Cofington and Elizabeth his Wife, brought a Writ of Dower, of the third part of the Land in Gower, against the Earl of Warwick, as Tenant; and the Writ was, *Quod reddat el rationabilem dotem de libero tenemento quod fuit Jo. Monbray quondam viri sui in terra de Gower in Wallia.*

It appears not in the Case to what Sheriff the Writ was directed, though this Case be in the Book at large, but it appears that those of the Chancery, and the Judges of the Kings Bench had been consulted with concerning the Writ (in bringing it for Dower in terra de Gower in Wallia) therefore it must issue from the High Court of Chancery, and must be directed consequently to the Sheriff of Gloucester, as the Assise was in 18 E. 2.

Br. abridging this Case, saith, The Action was against the Earl of Warwick, as being Lord of the intire Signiory of Gower, and then he was to be impleaded by Writ out of the Chancery here equally, and upon the same reason for a third part of the Signiory, as for the whole, according to the Case of 18 E. 2. first cited; for the Lord could no more make a Precipe to summon himself to his own Minister, or to make Execution against himself for a third part of the Royalty than for the whole: And therefore the Ordinance of Parliament then mentioned, equally extended to this Case as to that of 18 E. 2.

This

This is not strange that Acts of Parliament are lost sometimes; Note. the Act of 3 E. 1. by which old Customs were granted, not extant, but clear proofs of it remain.

These three last Cases therefore, wherein the Tenants were impleaded in the Courts here for Land in Wales, and Summons and Execution made by the Sheriff of the next adjoining County, are well warranted by an Act of Parliament not extant, being for either the Lordships Marchers themselves, or some part of them, and against the Lord himself, as that Case of 18 E. 2. expressly resolves.

All these were real Actions: The first an Assise of Novel Disseisin; the second a Writ of Cofenage; the third a Writ of Dower.

The like Case is cited 19 H. 6. That when the Mannor of Abergavenny was demanded, the Writ was directed to the Sheriff of Hereford, as Newton urged, for this was a Lordship Marcher, and held of the King in Capite, as appears by Moore's Reports in Cornwalls Case, in that the Barony of Abergavenny was held by the Lord Hastings of the King in Capite, to defend it at his charge, ad utilitatem Domini Regis. 19 H. 6. f. 12. A.

Exactly agreeing with this Doctrine is the Book of 21 H. 7. f. 33. B. f. 33. b. if a Signiory in Wales be to be tryed, it shall be tryed here by the Course of the Common Law; but if Lands be held of a Signiory in Wales, it shall be tryed within the Mannor, and not elsewhere.

As for that expression, by the Course of the Common Law, it is also in the Book 19 H. 6. that Deeds and all other things alleged in Wales, shall be tryed in the adjoining Counties at the Common Law, otherwise there would be a failure of Right: And of this opinion seemed most of the Justices, arguendo obiter, the Case before them not concerning Wales, but the County Palatine of Lancaster. 19 H. 6. f. 12. A.

Of Churches in Wales a Quare Impedit shall be brought in England, yet the Land, and other things in Wales, shall be determined before the Stewards of the Lords of Wales, if it be not of Lands between the Lords themselves. 30 H. 6. f. 6. B.

There is an ancient Book remarkable to the same purpose, speaking of the Common Pleas, This Court hath more Continuance of Pleas of the Welch Shires, than it hath of Pleas of the County of Chester; for the Pleas of Quare Impedit, and of Lands and Tenements held of the King in chief in Wales, shall be pleaded here, and they shall not be so of the County of Chester. 8 E. 3. Term; Mich. 39.

Fitz. Jurisdiction. p. 34.  
6 H. 5.

Land in Wales immediately held of the King, is pleadable in England per Haukford, 6 H. 5. no such Book at large.

The Law, and doubtless the Ordinance made by Parliament, mentioned in 18 E. 2. concerning Lordships Marchers, was the same concerning Land held in chief of the King, and are mentioned in the Books as synonymous, and were so for all Lordships Marchers were held from the Crown in chief, nor could the King probably have other Lands in chief in Wales, beside the Lordships Marchers, for all was either of Lordships Marchers, or Lands belonging to the Principality, and held from it, and not from the Crown in chief: To this purpose there is an ancient Statute 28 E. 3. very convincing.

28 E. 3. c. 2.

All the Lords of the Marches of Wales shall be perpetually Attendants, and annexed to the Crown of England, as they and their Ancestors have been at all times before this, in whose hands soever the same principality be, or shall come.

And they being no part of the Principality, and consequently not under the Statute and Ordinance of Wales, 12 E. 1. It was provided by a Law, That they should be impleaded in England, and the Summons and Tryal to be by the Sheriff of, and in the next adjoining County.

Accordingly you find the practice was by many ancient Cases remembered, but the Year-Books of E. 2. being never printed, wherein only that Statute is mentioned otherwise than in Fitz-herbert's Abridgment, and the Statute it self not extant, gave occasion to men obiter in the time of H. 6. & H. 7. long after, to say that such impleading for matters arising in Wales in the Courts of England, and the Tryals to be in the adjacent Counties, because they knew not it came to pass by Act of Parliament, was by the Common Law, on which had they reflected with seriousness, they had found it impossible.

For that Tryals concerning Lands in Wales, quatenus particularly Wales, after it became of the Dominion of England, should by the Common Law be differing from other Tryals in England, and in the adjacent Counties, could not possibly be for Wales, was made of the Dominion of England, within time of memory, viz. 12 E. 1. and whatever Tryal was at Common Law, must be beyond all memory: Therefore no such Tryal for Land in Wales particularly could be by the Common Law.

It remains then, That if such were at Common Law, it must be for Lands in all Dominions of the Acquisition of England consequently for Ireland, Garnsey, and Jersey, Gascoign, Guyen, Calais, Tournay, as well as Wales, but it was never in practice

practice or pretence that any such Tryals should be for any Land in these places.

Therefore it is evident, That it was, and it could be no otherwise than by Act of Parliament, that Wales differed from the other Dominions, belonging to England, in these Tryals.

Not was it by any new Law made by E. 1. or any his Successors, by the Clause in the end of the Statute of Rutland, which hath never been pretended: For by that Clause power was given to change Laws simply for Wales, but this way of Tryals changes the Law of England, in order to Tryals for Land in Wales, which that Clause neither doth, nor could warrant.

Besides this new way of Tryals concerning Lordships Marchers held in chief from the King, the Books are full, that in Quare Impedits for disturbance to Churches in Wales, the Summons and Tryal must be by the Sheriff of, and in the adjacent Countries, which is often affirmed and agitated in the Books, but with as much confusion, and as little clearness as the other concerning Land.

To this purpose is the Case before 8 E. 3. the Pleas of Quare Impedits, and of Land and Tenements held in chief of the King in Wales, shall be pleaded there. 8 E. 3. 39.

A Quare Impedit brought by the King against an Abbot, exception taken that the Church was in Wales, where the Kings Writ runs not, & non allocatur, for the King was party by the Book, as a reason. 15 E. 3. Fitz. Jurisdiction, p. 24.

A Quare impedit cannot be brought in Wales, because a Writ to the Bishop cannot be awarded, for they will not obey it, and so was the Opinion in that Case of Danby, Morton, and Newton, that Quare Impedits for Churches in Wales must be brought only in the Kings Courts, and the Opinion is there, that the Prince could not direct a Writ to the Bishops in Wales, upon Quare Impedits there brought. 11 H. 6. f. 3. A, B.

So is the Book of 30 H. 6. of Churches in Wales, a Quare Impedit shall be brought in England; the Case was cited before concerning Tryals of Lands in Wales. 30 H. 6. f. 6. B.

A Quare Impedit was brought in the County of Hereford of a disturbance in Wales to present to a Church, exception was taken by Littleton only to this, that the Plaintiff did not shew in his Count of Writ, that Hereford was the next adjoining County, but by the Book it was well enough, for if Hereford were not the next adjoining County, the Defendant might shew it, but no exception was taken to the bringing of the Writ into the County of Hereford, if it were the next County. 35 H. 6. f. 30. A, B.

Quare



36 H. 6. f. 33.  
A, B.

Quare Impeditis shall be brought here of Churches in Wales, and shall be sued in the Counties adjoyning, for that the Justices, (read it) Bishops, will not obey any man there.

If a Quare Impedit be brought here of a Church in Wales, it shall be tryed in the County adjoyning: The reason there given is the same as in many other Books, Car nous avomus power ad escrier al Evesque mes ils voylont, & parront ceo disobeyer.

It is manifestly misprinted, Car nous navomus power ad escrier al Evesque mes ils voylont & parront ceo disobeyer, which is not sense.

By these Books, and many other, it is clear, Quare Impeditis were formerly brought in England for Churches in Wales, as real Writs were for Land, and the Tryal was in the next adjoyning English County.

But as those Tryals for Land were only for Lordships Marchers held of the King in chief, or part of them, and that by special Act of Parliament, as hath been opened.

So the Quare Impeditis brought in England, and Tryals there had upon them, were not for all Churches in Wales, but for Churches only within the Lordships Marchers, whether of the Kings Patronage, or others; for there it is certain, according to the reason given in the Books, that the Stewards of the Lordships Marchers, to whomsoever they belonged, could not write to the Bishops. And Newton was right, 19 H. 6. That if Action of Dower once brought in the Court of any Signiory real (it should be Royal) in Wales, and there issue should be upon usque accouple in loyal Matrimony, which must be tryed by the Bishop, but the Court had no power to write to the Bishop, but therefore saith he, The King shall write to the Marshal to remove the Record hither, and then we shall make Process to the Bishop. But this is against the Resolution of all the Judges in Cr. 2 Car. 1. f. 34.

So as either of Necessity this was a provision in the same Act, That as well Quare Impeditis should be brought in England of Churches in the Lordships Marchers of Wales, as that Writs should be brought in England of Lordships Marchers, or any part of them in question, because Justice could not be had in Wales, either concerning such Lordships or Churches, or else Churches within Lordships Marchers, being in the same Case for a faster of Justice they were comprehended, and ought to be so within the equity of that Act of Parliament, for Justice to be had touching the Lordships themselves, and that the Law was such, appears

That

1. That only Quare Impedit for Churches in Lordships Marchers in Wales, and not for Churches in the ancient Shires, or of the Principality of Wales, whereof submission and render was made to E. 1. were to be brought and tried in England.

2. That Tryals and Writs in England for Land in Wales were only for Lordships Marchers, and not for any Land in Wales, which was of the ancient Principality; for the Lordships Marchers were, or most of them, of the Dominion of England, and held of the King in chief, as appears by the Statute 28 E. 3. c. 2. and by the Title of the Earl of March before the rendition of the Principality to E. 1.

That the Law was so for the Quare Impedit appears in the first place by the Book before cited, 11 H. 6. f. 3. where Danby, Martin, and Newton were of Opinion (argued about a Church in Garnsey, for the Case before them was not of a Church in Wales) That Quare Impedit for Churches in Wales were to be brought in England, which was true; but not for Churches which were not in any Lordships Marchers. Strange affirms positively in the same Case, in these words,

It is frequent to have *Quare Impedit* in Wales, and the Bishops there do serve the Writs directed to them, which I my self have often seen. And what he said was most true for Churches within the Principality, as what the other Judges said was also true concerning Churches within the Lordships Marchers, for those Courts had no power to write to the Bishops.

But this is most manifest by the Statute of Wales 12 E. 1. That the Kings Justiciar there had power within the County where he was Justiciar to write to the Bishops, which the Lords Marchers could not do.

The words of the Law are upon demand of Dower in Wales before the Kings Justiciar :

*Si forte objiciat, quare non debet dotem habere, eo quod nunquam fuit tali quem ipsa vocat virum legitimo matrimonio copulata, tunc mandabitur Episcopo quod super hoc inquirat veritatem, & inquisita veritate certificet Justitiarium Wallie, & secundum certificationem Episcopi procedatur ad judicium.*

It is clear also, That the Bishops of Wales were originally of the Foundation of the Princes of Wales, as is the Book of 10 H. 4. and their Courts did write to their own Bishops, as the Courts in England did to the Kings Bishops.

And

And when the Dominion of Wales was lawfully vested in the King of England, his Justices there must have the same power, as to the Bishops, that the Justices of the Courts of the Prince of Wales had before. Now the same stands in this point, since the Statute of 27 of the Union of Wales with England, shall be shewed after.

Besides what hath been already shewed, That the Writs out of the Chancery in England issued not into Wales for Tryals of Land, other than the Land of Lordships Marchers, and by a special Law that was provided, but neither for other Lands nor for other Issues arising in Wales, Tryals were not to be in the English Counties.

11 H. 6. f. 3. A.  
B.

In 11 H. 6. Danby saith, That if a Church in Wales, which is out of the Jurisdiction of the Common Law, and a Franchise of the Prince, cannot award a Writ to the Bishop, and for this cause it must be brought here: But other Actions are not maintainable here of a thing done in Wales, which was true of a thing done within the Principality, and of a Church within the Principality also, a Quare Impedit was not to be brought in England.

19 H. 6. f. 12. A.

In 19 H. 6. Fortescue takes a difference between Wales, which was once a Kingdom of it self, and the Counties Palatine, which were parcels of England, and therefore saith, The King may send a Record to be tryed in the Counties Palatine, because he might do so at Common Law, but could not into Wales, because he could not at Common Law.

And then he saith, That is the cause that the Statute wills, that of things pleaded there (as of a Release bearing date there) it shall be tryed in the next adjoyning County. That this Statute should be, he means, unless it be the same mentioned in the Case 18 E. 2. is not intelligible; for the Statute of 9 E. 3. which speaks of Releases pleaded in Franchises within the Realm, That they should be tryed in the County where the Action was brought, he cannot intend, for that Wales was no Franchise nor Franchis of the Realm, and Tryals where the Action is brought is not a Tryal in the next adjoyning County to the place where the Issue arises. And by Ascue expressly in that Case, that Statute proves in it self it doth not extend to a Deed bearing date in Wales, but all such Deeds, and all other things alledged in Wales, shall be tryed in the County next adjoyning by the Common Law, for so he adds, which could not be.

So as an Action brought upon a Bond or Deed made in Wales, Ireland, Normandy, & Dutchland, or upon a matter there alledged, cannot possibly be for want of Tryal, but a Plea in Barr to an Action brought arising there; some question hath been, Whether such a Plea shall not be tryed where the Action is brought? and in such a Case, if the Plea in Barr arise wholly out of the Realm of England, the better Opinion is that such Plea wants a Tryal: See for this 32 H. 6. 25. B. 8 Ail. pl. 27. d. Dowdales Case, Co. l. 6.

Thus bringing Actions in England, and trying them in Counties adjoining to Wales, without knowing the true reason of it, also bringing Quare Impedit in like manner for Churches in Wales, without distinguishing they were for Lands of Lordships Marchers held of the King, and for Churches within such Lordships Marchers, hath occasioned that great diversity and contrariety of Opinions in our Book; and at length that common Error, That matters in Wales, of what nature soever, are impleadable in England, and to be tryed in the next adjoining County.

When no such Law was ever pretended to be concerning other the Kings Dominions out of the Realm, belonging to the English Crown, of the same nature with Wales, as Ireland, the Isles of Garnsey and Jersey, Calais, Gascoign, Guyen anciently.

Nor could it be pretended of Scotland if it should become a Dominion of the Crown of England, it being at present but of the King of England, though it was otherwise when the King came to the Crown.

And to say that Dominions contiguous with the Realm of England, as Wales was, and Scotland would be, is a thing so simple to make a difference, as it is not worth the answering; for no such difference was assignable before Wales became of the Dominions of England, and since, the Common Law cannot make the difference, as is observed before.

It remains to examine what other Alterations have been by Act of Parliament, whereby Jurisdiction hath been given to the Courts of England in Wales, without which it seems clear they could have none.

1. And first by Parliament 26 H. 8. power was given to the Kings President and Council in the Marches of Wales in several Cases.

2. Power was given to indict, outlaw, and proceed against Traytors, Clippers of Money, Murderers, and other Felons within the Lordships Marchers of Wales, so indicted in the adjoining Counties by the same Statute, but not against such Offenders within the Principality of Wales, which was not Lordships Marchers.

h h

3. Some



3. Some other Laws are of this nature about the same time, to punish the perjury of Jurors in Wales, generally before the Council of the Marchers.

1 E. 6. c. 10. &  
21 Eliz. c. 3.

Recess Exi-  
gent.

That Proclamations upon Exigents should issue into Wales, was ordained by the Statute of 1 E. 6. for by a Statute before in 6 H. 8. c. 4. such Proclamations went but to the adjoining Counties, but the *Capias utlagatum* went always, as I take it, being a Mandatory Writ for the King, but by 1 E. 6. c. 10. That if any persons dwelling in Wales shall, after the time limited by the Act, be outlawed, that then Writs of special *Capias utlagatum*, single *Capias utlagatum*, *Non molestando*, and all other Process for or against any person outlawed, shall issue to the Sheriffs of Wales, as immediate Officers of the King's Bench and Common Pleas.

*Capias Utlagatum*.

34 H. 8.

So as the issuing of a *Capias utlagatum* into Wales, is clear by Parliament.

Persons having Lands in Wales, and bound in Statute Staples or Recognizances in England, Process to be made against them out of the Chancery in England to the Sheriffs of Wales, and for Recognizances acknowledged before either of the Chief Justices by them, Process to be immediately pursued from the said Justices.

24 H. 8. c. 26.

All Process for urgent Causes to be directed into Wales by command of the Chancellor of England, or any of the King's Council, as hath been used.

The next is the Alteration made by the Statute of 27 H. 8. which was very great, and by which it is commonly taken, that Wales was to all purposes united with England, and that since all Process may issue out of the Courts here to Wales.

It is said that the Dominion and Principality of Wales is, and always hath been, incorporated to the Realm of England, that is, ut per Stat. Wallie 12 E. 1. *jure feodali*, non *proprietas*, and so it is expounded in Calvin's Case.

Cal. C. 7 Rep.  
f. 21. B.

But there it is said by 12 E. 1. which is there taken for an Act of Parliament, Wales was united and incorporated unto England, and made parcel of England in possession, and the Case of 7 H. 4. f. 14. there cited; but this is clearly otherwise, for unless that Stat. Wallie were an Act of Parliament, it could not make Wales part of England, which is much questioned; for no such Parliament is found summoned, nor Law made in it, nor is it likely at that time a Parliament of England should be summoned there, for Rutland is doubtless in Wales, which had it

it been part of England then made, all Laws made, or to be made in England, without naming Wales, had extended to it, which they did not before 27 H. 8.

The Incorporation of Wales with England by that Act, consists in these particulars generally.

1. That all persons in Wales should enjoy all Liberties, Privileges, and Laws in England, as the natural born Subjects of England.

2. That all persons inheritable to Land, should inherit the same according to the Laws of England, thereby inheriting in Gavel kind was abrogated.

3. That Laws and Statutes of England, and no other, should for ever be practised and executed in Wales; as they have been, and shall be in England.

And as by this Act hereafter shall be further ordained: By this Clause not only all the present Laws of England were induced into Wales, but all future Statutes of England to be made, were also for the future in like manner induced into Wales, which was more than ever was done in Ireland; though Ireland before, and by Parning's Act, had the present Laws then, and Statutes of England introduced into Ireland, but not the future Laws and Statutes to be made, as in this Case was for Wales.

But this gave no Jurisdiction in general to the Courts of England over Wales more than before; nor otherwise than if a Law were made in England, That the Laws and Statutes of England now, and for the future always to be made, should be Laws in Ireland, the Courts in England would not thereby have other Jurisdiction in Ireland than they already have in any respect.

The Uniting of Wales to England, and Incorporating, both Note. not thereby make the Laws used in England to extend to Wales, without more express words, Pl. Com. 129. B. 130. A.

By this Act it appears, That the Lordships Marchers in the Dominions of Wales, did lye between the Shires of England and the Shires of Wales, and were not in any Shire: most of which Lordships were then in the King's possession, and some in the possession of other Lords: And that divers of them are by the Act united and joynd to the County of Gloucester, others to the County of Hereford, and others to the County of Salop; others respectively to the Shires of Glamorgan, Carmarthen, Pembroke, and Merioneth.

The residue of the said Lordships Marchers were thereby framed and divided into five particular Counties, erected and created by the A<sup>d</sup>, namely, the County of 1 Monmouth, 2 of Brecknock, 3 of Montgomery, 4 of Radnor, 5 of Denbigh.

The respective Lordships Marchers annexed to the respective English Counties of Salop, Hereford, and Gloucester, are now to all intents under the Jurisdiction of the Courts at Westminster, in like manner as the Counties to which they were annexed formerly were, and yet are.

So is one of the new created Counties framed out of the said Lordships Marchers, namely, the County of Monmouth, which by the said A<sup>d</sup> is to all purposes under the Jurisdiction of the Kings Courts at Westminster, as any English County is.

All the Lordships Marchers annexed to the ancient Shires of Wales, are now, since the Statute, under the same Jurisdiction for Administration of Justice, as those ancient Shires were before the Statute of the 27. and yet are, so as the Lordships Marchers annexed to those ancient Shires of Wales, are now such parts of them as the Lordships Marchers annexed to the English Shires are parts of them.

And the four new Shires in Wales, excluding Monmouth Shire, are by the said A<sup>d</sup> under the same Administration of Justice, by the King's Justices, to that purpose there Commissioned, as the other ancient Shires of Wales formerly were, and are, and consequently wholly out of the Jurisdiction of the King's Courts at Westminster.

And the reason appears in the Statute, soasmuch as the Counties or Shires of Brecknock, Radnor, Montgomery, and Denbigh be far distant from the City of London, and the Inhabitants of the said Shires not of substance to travel out of their Counties to have the Administration of Justice.

It is therefore enacted, that there shall be respective Chanceries and Exchequers in these Counties, and that the Sheriffs of those Counties shall make their Accompts before the Chamberlain and Barons there appointed.

And that Justice shall be used and ministered in the said new Shires, according to the Laws and Statutes of England, by such Justiciar or Justicers as shall be thereto appointed by the King, and after such form and fashion as Justice is used and ministered to the King's Subjects within the three Shires of North-wales, which is according to the ancient Administration of Justice by the Statute of Wales 12 E. 1.

So as since this Statute the Courts of Westminster have less Jurisdiction in Wales than before; for before they had some in all their Lordships Marchers, which were in no County, as by this Act, and since, they being all reduced into Counties, either of England or Wales, their Jurisdiction is absolute over such of them, as are annexed to English Counties, but none over the rest.

And accordingly it hath been still practised since the Statute, for before, Lordships Marchers and Quare Impedit of Churches within them were impleadable in the Kings Courts by Originals out of the Chancery, directed to the adjoining Sheriffs, and the Issue tried in the Counties adjoining.

But since no such Original hath issued for real Actions, nor any such Trial been.

And what hath been in personal Actions of that kind, began upon mistake, because they found some Originals issued into some part of Wales, and knew not the true reason of it, that it was by Act of Parliament, they then concluded Originals might issue for any cause arising into any part of Wales, and the Trials to be in the adjacent Counties of England generally.

And though that practise hath been deserted since the Statute of 27 H. 8. as to real Actions, because the subject matter of the Lordships Marchers was taken away, which in some sense was lawful (as is opened) before the Statute, yet they have retained it still in personal Actions, which was never lawful, nor found in any Case anciently practised, as real Actions were, as appears in the Case of Stradling and Morgan in the Commentaries; yet that was upon a quo minus out of the Exchequer, which I do not see how it can change the Law.

If Judgments be obtained in the King's Courts against persons Obj. 1. inhabiting in Wales, and that Process of Execution cannot be awarded thither, the Judgments will be ineffectual.

The same may be said of Judgments obtained against a French- Answ. 1. man, Scotch man, or Dutch-man, whose usual Residence, Lands, and Goods are in those Territories; he that sues ought to foresee what benefit he shall have by it, and must not expect it, but where the Courts have Jurisdiction.

The same may be said of Judgments obtained here against Irish-men, Garnsey or Jersey Inhabitants, or formerly against those of Calais, Gascoign, Guyen, which were equally, and some are still, of the Dominions of England, as Wales is subject to the Parliament of England, but not under the Jurisdiction of the Courts at Westminster, though subject to Mandatory Writs of the King. 2.

That



Object. 2. That of Judgments obtained in the King's Courts, Execution is had in Franchises, and also in Counties Palatine, where the King's Writ runneth not, and by the same reason ought to be had in Wales, though the King's Writ runneth not there.

Ans. 1. Franchises inferiour are deriv'd out of Counties by the King's Grant, where the King's Writ did run, and so were Counties Palatine part of the Realm anciently, where the Subjects of the Realm had right to have Execution of the Lands and Goods of those against whom they recovered in the King's Courts, whereof they are no more to be deprived than of their Actions by the King's Grant, for he may make what Counties he pleases Counties Palatine; but in Dominions out of the Realm, the Subject had no such Right, in the other they have it, because they had it at Common Law, but in others not, because they had it not at Common Law.

2. When the Question is of the Jurisdiction in a Dominion or Territory belonging to England, the way to determine it is by examining the Law in Dominions, the same in Specie with that concerning which the Question is, and not to examine the Law in Franchises or Dominions of another kind: Therefore to determine what Jurisdiction the King's Courts have in Wales, ought to be by examining their Jurisdiction in Ireland, the Islands of Garnsey, Jersey; Calais, Gascoign, Guyen, in former times, some part of Scotland, and the Western Islands, and many others might be named which are Dominions in Specie the same with Wales, and belonging to England, where the King's Writ runneth not; and not this power in Franchises within the Realm, part of English Counties, before they were Franchises, and continuing so after, or in entire Counties Palatine, which sometimes were under the Jurisdiction of the King's Courts, and in which the Subjects had a right of their Tryals upon Pleas pleaded, and of Execution, and which cannot be taken from them where the King's Writ runneth not.

The Cases are full in this point in 19 H.6.f.12.& 32 H.6.f.25. and many more Books.

Object. 3. That by the Statute of 9 E. 3. Pleas of Releases or Deeds, dated in Franchises within the Realm, shall be tryed where the Action is brought.

Wales is no Franchise, or if it were, not within the Realm; Answ. for the questions concerning a Deed pleaded, bearing date there, but not Original Process for Causes arising, and Tryals of them in the next County adjoining, and not in the County where the Action of a Deed dated in a Franchise of the Realm, which do toto cœlo differ, and concerning Executions and judgments here to be made in another Dominion.

The same may be said concerning the Statute of 12 E. 2. when Witnesses to Deeds in Forreign Franchises are to be summoned with the Jury, and the Tryal, notwithstanding their absence, to proceed when the Writ is brought.

Presidents of Process issued to the Sheriffs of Wales, without a Judicial decision upon Argument, are of no moment: Many things may be done several ways (as Bonds) though they have regularly one common form, yet they may be in other forms as well. Presidents are useful to decide questions, but in such Cases as these which depend upon Fundamental Principles, from which Demonstrations may be drawn, millions of Presidents are to no purpose: Besides, it is known, that Officers grant such Process to one Sheriff of County, as they use to another, nor is it in them to distinguish between the power of the Court over a Sheriff in Wales from a Sheriff in England, especially when they find some Writs of Execution going which are warranted by Acts of Parliament, which they know not, though they do know Process of Execution in fact runs thither, as Capias utlagatum, Extents upon Statute, which are by Acts of Parliament. And that other Mandatory Writs issue thither as well at Common Law, as by a particular Clause concerning the Chancellor in the Act of 24 H. 8. c. 26.

Obj. 4.

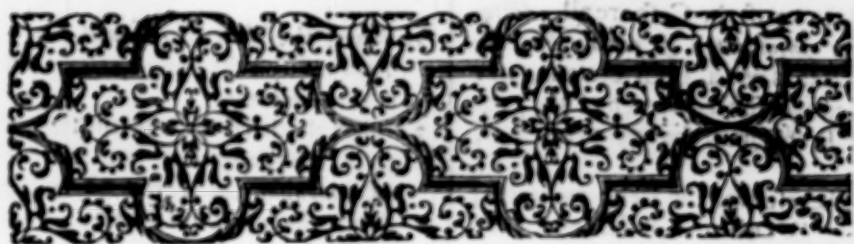
By the Register upon a Judgment had in the Common Pleas against a Clerk, who was after made Archbishop of Dublin in Ireland, upon a Fieri Facias issued to execute the Judgment to the Sheriff of Middlesex, and his Return that he had no Lands or Goods in his Bayliwick, but was Archbishop in Ireland, upon a Testatum of it in the Common Pleas, that he had Lands and Goods in Ireland, a Fieri Facias issued in the King's name, Justiciario suo Hiberniæ, to make Execution; but it appears not whether this Writ issued from the Common Pleas, or especially by the King's Direction out of the Chancery, which possibly may be as a special Mandatory Writ of the Kings locum tenens there, which varies in stile at the Kings pleasure; anciently Justiciario suo Hiberniæ, at other times Locum tenenti nostro, at other times Deputat. or Capitaneo generali nostro, which stiles are

Registr. f. 43. B  
Brevium Judicialium.

are not regularly known to the Officers of the Courts at Westminster.

And perhaps by special Writs to the chief Officer and the King, Execution may be made of Judgments given at Westminster in any of his Dominions, which would be enquired of.

F I N I S.



An Exact and Perfect

# TABLE

TO THE  
REPORTS and ARGUMENTS  
OF

Sir JOHN VAUGHAN, Lord Chief Justice  
of the Court of *Common Pleas*.

## Abatement of Writs, See Writs.

1. **W** Here a Writ is brought  
against an Executor in  
Debt upon a simple  
Contract, he may abate it, 94
2. Judges ought not *Ex officio* to abate  
Writs, but it must come before  
them by Demurrer, 95

## Act of the Party.

1. Every act a man is naturally ena-  
bled to do is in it self equally  
good, as any other act he is so en-  
abled to do, 333

## Actions, and Actions upon the Case.

1. Actions upon the Case are more  
in, 111



## The Table.

- inferior, and ignobler than Actions of Debt, 101
2. Actions of the Case are all *Actio- nes Injuriarum & contra Pacem*, and it is not a Debt certain, but damages for the breach of the promise that must be recovered in it, 101
3. Wheresoever the Debt grew due, yet the Debtor is indebted to the Creditor in any place where he is, as long as the Debt is unpaid, 92
4. The Plaintiff must recover by his own strength, and not by the Defendants weakness, 8, 58
5. If you will recover any thing against any man, it is not enough for you to destroy his Title, but you must prove your own better than his, 60
6. In life, liberty, and estate, every man who hath not forfeited them, hath a property and a right which the Law allows him to defend, and if it be violated, it gives an Action to redress the wrong, and punish the wrong-doer, 337
7. There are several penal Laws by transgressing of which the Subject can have no particular damage, and therefore no particular Action, 341
8. All Actions brought against Officers within the Statute of the One and twentieth of K. James, must be laid in the proper County, 115, 116, 117
9. Case and not Debt lies for a Solicitor for Soliciting Fees, 99

### Ad quod dampnum.

1. When the King can license without a Writ of *Ad quod dampnum*, he

may license if he will, whatever the Return of the Writ be, 341, 345

2. Where the Writ of *Ad quod dampnum* informs the King better than a *Non obstante*, 356
3. Though there be a Return upon an *Ad quod dampnum*, that it is not *ad dampnum*, yet there must be the Kings license afterwards, 341

### Administration and Administrator.

1. How they are to administer the Intestates Estate, 96
2. An Administrator hath a private office of trust, he cannot assign nor leave it to his Executor, 182
3. An Administrator must take an Oath to make a true accompr, 96
4. An Action will not lye against them upon a Tally, because it is no good Specialty, 100
5. In an Action of Debt upon Bond or Contract brought against him he may confess Judgment, if there is no fraud, although he hath notice of a former Suit depending, 95, 100
6. If an Administrator, *durante minore Estate*, brings an Action, he must averr the Administrator or Executor to be under the Age of Seventeen years, 93
7. The manner of pleading *Plene administravit prater & ultra*, 154

### Advowson, See Quare Impedit.

1. The rights of an Advowson, 7
2. Where the Plaintiff and Defendant must alledge Seisin in an Advowson by a former Presentation, 8

Agent

## The Table.

### Agent and Patient.

1. In a *Quare Impedit* both Plaintiff and Defendant are Actors, and may have a Writ to the Bishop, 6, 7, 58

Age, See Infant.

### Alien.

1. The time of the birth is of the Essence of a Subject born, for he cannot be a Subject unless at the time of his birth he was under the Kings Liegeance, 286, 287
2. Regularly who once was an Alien to *England*, cannot be inheritable there but by Act of Parliament, 274, 282
3. He that is privileged by the Law of *England* to inherit, must be a Subject of the Kings, 268, *in loco* 278, 286
4. He must be more than a local Subject, *ibid.* 286
5. He must be otherwise a Subject, than any Grant or Letters Patents can make him, *ibid.*
6. The Natives of *Jersey*, *Garnsey*, *Ireland*, and the English Plantations, &c. are not Aliens, 268 *in loco* 278, 279
7. Those which are born in the Kings Forreign Plantations, are born his Natural Subjects, and shall inherit in *England*, 279
8. A Natural Subject is correlative to a Natural Prince, and a man cannot have two natural Sovereigns, no more than two Fathers or two Mothers, 280, 273 *in loco* 283
9. The several ways by which men

- born out of *England* may inherit in *England*, 281
10. An *Antenatus* in *Scotland* shall not inherit without an Act of Parliament, because he is an Alien, 274 *in loco* 284, 287
  11. Who are the *Antenati & Postnati*, and the difference between them, 273 *in loco* 283
  12. An Act of Parliament in *Ireland* shall never Naturalize an Alien to *England* to make him inheritable there, 274 *in loco* 284
  13. No Tenure by Homage, &c. in any of the Kings Dominions; acquired by Conquest, or by Grant, or Letters Patents, can make a man inheritable in *England*, 279
  14. No Laws made in any Dominion acquired by Conquest, or new Plantation by the Kings Governor or people there, by virtue of the Kings Letters Patents, can make an Alien inheritable in *England*, 279
  15. One Naturalized in *Scotland* since the Union, cannot inherit in *England*, 268 *in loco* 278, 279, 280, 285
  16. A man born a Subject to one that is King of another Country, and who afterwards comes to be King of *England*, is an Alien, and shall not inherit in *England*, *ibid.* 285, 286
  17. An act of Law making a man as if he had been born a Subject, shall not work the same effect, as his being born a Subject, which is an effect of Law, 280
  18. An Alien hath issue a Son, and afterwards is Denizen'd, and he afterwards hath another Son, here the youngest Son shall inherit, 285

## The Table.

### Allegiance.

1. All Allegiance and Subjection are acts and obligations of Law, the subjection begins with the birth of the Subject, at which time the Kings protection of him likewise begins, 279

### Appendant.

1. Whatsoever is appendant to the Land goes to the Occupier thereof naturally, 190
2. An Advowson may be appendant to a Mannor, 12

### Apprentice.

1. The Law permits not persons, who have served Seven years to have a way of livelyhood, to be hindred from the exercise of their Trades in any Town or part of the Kingdom, 356

### Arch-bishop, See Ordinary, Dispensation.

1. The Arch-bishop may dispense for a Plurality, 20

### Assets.

1. The manner of pleading *Assets ultra*, 104

### Assignee and Assignment.

1. Offices or acts of personal Trust cannot be assigned; for that Trust which any man may have, is not personal, 180, 181

2. An Occupant becomes an Assignee in Law to the first Lessee, 204

3. If a man Covenants against himself, his Executors, Administrators, and Assigns, yet if his Assigns do a tortious act, it is no breach of the Covenant, because he may have remedy by Action for the tort, 118 to 128

### Assise.

1. An Assise will not lye for a Rent issuing out of Tythes barely, 204

### Attaint, See Title Statutes, 3, 11.

1. An Attaint lies only in Civil, not Criminal Causes, 145, 146
2. Jurors are not finable for a false Verdict, an Attaint only lies against them, 145

### Attorney.

1. An Attorney cannot bring Debt for Soliciting, but Case only, 99
2. The Defendant cannot wage his Law for Attorneys Fees, *ibid.*

### Attornment.

1. By the Common Law an Attornment was requisite to entitle the Lord, the Reversioner, the Grantee of a Remainder, or of a Rent by Deed or Fine, to distrain for Rent in arrear, 39
2. By a Grant and Attornment the Grantee becomes actually seised of the Rent, 40

3. At-

## The Table.

3. Attornment and power to distrain follows the possession, and not the use, 43
4. An Attornment cannot be for a time, 27
5. An Attornment of the Tenant doth not disclaim, but affirm his possession: For it is the act of the Tenant by reason of his being in possession, 193
6. A mans Estate in a Rent-charge may be enlarged, diminished, or altered, and no new attornment or privity requisite to such alteration, 44
7. Attornment is requisite to the Grant of an Estate for life, but to a Confirmation to enlarge an Estate it is not, 44, 45, 46
8. A Rent-charge is granted to Commence Seven years after the death of the Grantor Remainder in Fee, Attornment must be made in the life time of the Grantor, 46
9. If a Fine is levied of the Reversion of Land, or of a Rent to uses, the *Cestuy que use* may distrain without Attornment, 50, 51
10. Where a Rent, Reversion, or Remainder is sold by Bargain and Sale, the Bargainee may distrain without Attornment, 51
11. Where a man is seised of a Rent-charge and grants it over, to which the Tenant attorns, and he afterwards retakes that Estate, here must be a new Attornment, for the former privity is wholly destroyed 44
12. Where an Attornment shall be good to a contingent use, 52

### Bargain and Sale, See Intollment.

1. **W** Here a Rent, Reversion, or Remainder is sold by Bargain and Sale, the Bargainee may distrain for the Rent without Attornment, 51

### Baron and Feme.

1. The man after the marriage hath the deduction of the woman *ad Domum & Thalamum*, and all the civil power over her, and not she over him, 306
2. The Interdicts of carnal knowledge in the Levitical Law were directed to the men, not to the women, who are interdicted but by a consequent, for the woman being interdicted to the man, the man must also be interdicted to the woman, for a man cannot marry a woman and she not marry him, 305

### Bishop, See Ordinary, Archbishop.

1. What Bishops were originally, 22
2. A Parson is chosen Bishop, his Benefices are all void, and the King shall present, 19, 20
3. It is not at all inconsistent for a Bishop to be an Incumbent, 22
4. A Bishop may be an Incumbent after Consecration, 24
5. How many Benefices a Bishop may retain by a Dispensation, 25
6. No Canon Ecclesiastical can be made



## The Table.

- made and executed without the Kings Royal assent, 329
7. Bishops in *Wales* were originally of the foundation of the Prince of *Wales*, 411

### Canons Ecclesiastical, See Title Ecclesiastical Court.

1. **W**Hat Canons are good and binding, and what not, 327, 328

### *Capias ad Satisfaciendum*, See Execution.

### *Certiorari*.

1. A *Certiorari* lies out of the *Chancery* to *Ireland* to certify an Act of Parliament, but it doth not lye to *Scotland*, 287
2. A *Certiorari* doth not lye to *Wales* to certify a Record to the Courts at *Westminster*, to the intent that Execution may issue out here upon it, 398

### Certificate.

1. There are many things whereof the Kings Courts sometimes ought to be certified, which cannot be certified by *Certiorari*, 288

### Chancery.

1. The *Chancery* may grant a *Habeas Corpus*, and discharge a Prisoner thereupon as well as the *Kings Bench*, 157

### Commendam.

1. *Capere in Commendam* is good where the Patron is not prejudiced, 25
2. *Retinere in Commendam* is good, where consented to by him that was to present to the Avoidance, 25
3. *Commendam Retinere* may be for years, 24, 25
4. How many Benefices a Bishop may retain, by a Dispensation, 25
5. Although the King confirms it, yet the Incumbent derives no Estate from the King, but only by the Patrons presentment, 26

### Common, See Title Statute 1.

1. No Common of Pasture can be claimed by Custome within the Mannor, that may not be prescribed for out of the Mannor, 254
2. Inhabitants not Incorporated cannot prescribe in a Common, 254
3. How Copyholders must prescribe for Common, *ibid.*
4. Where the Tenant may prescribe to have *sola & separalia Communia*, and where not, 255, 256
5. One or more Tenants may have *solum & separalem Communiam* from other Commoners, but not from the Lord, 256
6. Where the Commoner claims *habere solum & separalem Pasturam*, how and upon what Action, Whether the Lord shall be excluded or no? the matter will come in question, 253
7. Where a Commoner prescribes for Com-

## The Table.

Common for Cattel levant and couchant, *Antiquo Messuagio*, without any Land, the prescription is taught, because Cattel cannot be levant and couchant to a Common intent, upon a Messuage only, 252,

253

8. Where the Lord may approve against the Commoners being an Exposition of the Statute of *Merton*,

256, 257

### Common Pleas Court.

1. The *Common Pleas* or *Exchequer* may, upon the Return of a *Habeas Corpus*, discharge a Prisoner, if it appear the Imprisonment is against Law, 157
2. If the Imprisonment is just, or doubtful and uncertain, the *Common Pleas* cannot bayl him, but must remand him, 157
3. A Prohibition for incroaching of Jurisdiction lies in the *Common Pleas*,

157

### Condition.

1. The difference between a Condition and Limitation, 32
2. A Devise to the Son and Heir, and if he did not pay all the Legacies, that then it shall remain to the Legatees: In default of payment this shall vest in the Legatees by Executory Devise, 271

### Condition of an Obligation.

1. A Bond is entred into with Condition for quiet Enjoyment, the Defendant pleads that the Plaintiff

entred, and might have quietly enjoyed: the Plaintiff replied, That he was outed by *J. S.* the Replication is void, because he did not say that *J. S.* had a good Title.

121, 122

### Confirmation.

1. A Confirmation cannot be for a time, 27
2. Where it shall enlarge an Estate, 44,
3. The Kings Confirmation of a *Commendam* transfers no Right to the Incumbent, 26

### Constable, See Title Officer.

### Construction of Law, See Title Law.

1. It is both equitable and of publick convenience, that the Law should assist men to recover their dues, when detained from them, 38
2. It is an absurdity to say, That a man hath a Right to a thing, for which the Law gives him no remedy, 47, 138

### Copyholder.

1. They cannot prescribe against the Lord to have *solum & separalem Possuram*, 254, 255
2. How the Copyholders must prescribe for Common, 254

### Corporation.

1. The King may dispense with a Corporation for any thing which in its nature

## The Table.

- nature may be dispensed with, 347, 348
2. The King may dispense with a Corporation as to penal Laws, 349, 350
  3. What Licenses made by the King to Corporations are good, and several instances of them, 348, 349, 350
  4. What Licenses to a Corporation are not good, 351, 352

### Costs, See Damages.

1. Upon a Nonsuit or Discontinuance upon an Action brought against Officers, they shall have their double Costs by the Statute of the One and twentieth of King James, 117

### Covenant.

1. All Covenants between the Lessor and Lessee are Covenants in Law, or express Covenants, 118
2. An express Covenant, restrains the general Covenant in Law, 126
3. Where the Covenant is to enjoy against one or more particular men, and where against all men, 127
4. By a Covenant in Law the Lessee is to enjoy his Term against the lawful entry or interruption of any man, but not against tortious Entries, because the Lessee hath his proper remedy against the wrongdoers, 118, 119
5. If a stranger, who hath no right, outs the Lessee, he shall not bring Covenant against the Lessor, because he hath remedy by Action against the stranger: But if he enter by

- elder Title, then he shall have Covenant, because he hath no other remedy, 119, 120
6. Though the Covenant is that the Lessee shall enjoy against all persons, yet he shall not have Covenant against the Lessor, unless he be legally outed, 119, 120, 121, 123
  7. The Law shall never adjudge that a man covenants against the wrongful acts of strangers, except the words are full and express, 121
  8. When the Covenant is to enjoy against all men, the Covenant is not expressly to enjoy against tortious acts; neither will the Law so interpret it, 123, 125

### Coverture, See Baron and Feme.

### County Palatine, See Title Franchise.

### Court of Courts, See Common Pleas, Kings Bench.

1. The Court of *Kings Bench* cannot pretend to the only discharging of prisoners upon *Habeas Corpus* (unless in case of privilege) but the *Chancery* may do it without question, 157
2. Prohibitions for incroaching Jurisdiction, may issue as well out of the *Common Pleas* as *Kings Bench*, *ibid.* 209
3. The Judges of the Temporal Courts have full conizance of what Marriages are within the Levitical Degrees, and what not, 207
4. They have likewise conizance of what

## The Table.

- what Marriages are incestuous, and what not; and may prohibit the Ecclesiastical Courts from questioning such Marriages, 207
5. The Secular Judges are most conizant of Acts of Parliament, 213
6. If a Court give Judgment judicially, another Court is not bound to give the like Judgment, unless it think that Judgment first given to be according to Law, 383
7. The Court of the Sessions in *London* doth not differ in its essence, nature, and power from another Sessions in the Country; but all differ in their accidents, which make no alteration in their actings in the eye of the Law, 140

### Customs, See Prescription.

1. How things become strangely unnatural to man by custom only, 224

### Customs for Merchandize, See Title Statutes 2, 25.

1. The Customs called *Customs Antiqua* for Wooll, Wooll-fells, and Leather, were granted by Parliament to King *Edward* the First, in the third year of his Reign; and was no Duty at the Common Law, 161, 162, 163
2. The several properties that Wines must have which are lyable to pay Tonnage and Poundage by the Act of 12 Car. 2. 165
3. No goods are to pay Customs but those which are brought in to Merchandize, not such as come in by accident, as in case of wreck, 165, 166, 171, 172

4. By the common Law all wrecks were the Kings, and therefore not lyable to pay Customs, because they were his own, 164

### Damages, See Costs.

1. In an Action upon the Case the whole Debt is recovered in Damages, 101

### Debt.

1. Debts by simple contracts were the first Debts that ever were, and are more noble than Actions on the Case, upon which only damages are recoverable, 101
2. Actions in the *debet & detinet* are actions of property, which is not in an action on the Case, *ibid.*
3. Actions upon Bond or Deed made in *Wales, Ireland, Normandy, &c.* where to be tryed, 413
4. Wheresoever the Debt grew due, yet the Debtor is indebted to the Creditor in any place where he is, as long as the Debt is unsatisfied, 92
5. It lies not for a Solicitor for his soliciting Fees, but for an Attorney it well lies and there shall be no ley Gager in it, 99

### Declaration, See Pleading.

1. The Plaintiff must recover by his own strength, and not by the Defendants weakness, 8, 58, 60
2. When the Plaintiff makes it appear



## The Table.

- to the Court that the Defendants Title is not good, yet if the Plaintiff do not make out a good Title for himself, he shall never have Judgment, 60
3. The form of a Declaration in *London* according to their custome, 93
4. The King may vary his Declaration, but it must be done the first Term, 65
5. In a *Quare Impedit* the Plaintiff must in his Declaration alledge a presentation in himself, or those from whom he claims, 757

### Demand, See Request.

1. A Demand of Rent is not requisite upon a Limitation, because Non-payment avoids it, 32
2. But where there is a condition, there must be a demand before entry, *ibid.*
3. Where there are several Rents, the demands must be several, 72
4. If more Rent is demanded than is payable, the demand is void, *ibid.*

### Devastabit, See Executors.

### Devise, Devisor, Devisee.

1. The Law doth not in Conveyances of Estates, admit Estates to pass by Implication regularly, but in Devises they are allowed with due restrictions, 261, 262, &c.
2. If an Estate given by Implication in a Will be to the disinheritance of the Heir at Law, it is not good if such Implication be only con-

structive and possible, but not a necessary Implication, 262, 263, 267, 268

3. The necessary Implication is, that the Devisee must have the thing Devised, or none else can have it, 262, 263
4. *A.* deviseth his Goods to his wife, and after her decease his Son and Heir shall have the House where they are, this is a good Devise of the House to the wife by Implication, because the Heir at Law is excluded by it, and then no person can claim it but the wife by Implication of the Devise, 263, 264
5. *A.* having issue *Thomas* and *Mary*, devises to *Thomas* and his Heirs for ever; and for want of Heirs of *Thomas*, to *Mary* and her Heirs. This is an Estate tayl in *Thomas*, 269, 270
6. My will is, if it happen my Son *George*, *Mary*, and *Katherine* my Daughters, to dye without issue of their bodies lawfully begotten, then all the Freehold Lands I am now seized of, shall remain and be to my Nephew *A. B.* The construction and meaning of these words & *quid operatur* by them, 260, 261, 262, 263, 264, &c.
7. If Land is devised to *H.* and his heirs as long as *B.* hath heirs of his body, the remainder over, such latter Devise will be good, not as a Remainder, but as an Executory Devise, 270
8. My son shall have my Land to him and his heirs, so long as any heirs of the body of *A.* shall be living, and

## The Table.

- and for want of such heirs, I devise it to *B.* here *B.* shall take by future and Executory Devise, 270
9. A Devise to the son and heir in Fee, being no other than what the Law gave him, is void, 271
10. A Devise that if the son and heir pay not all the Legacies, then the Land shall go to the Legatories, upon default of payment this shall vest in the Legatories by Executory Devise, 271
11. *A.* had issue *W. T.* and *R.* and devises to *T.* and his heirs for ever, and if *T.* died without issue, living *W.* that then *R.* should have the Land, this is a good Fee in *T.* and *R.* had a good Estate in possibility by Executory Devise upon the dying of *T.* without issue, 272
12. An Executory Devise cannot be upon an Estate tail, 273
13. I bequeath my son *Thomas* to my Brother *R.* to be his Tutor during his minority; here the Land follows the custody, and the Trust is not assignable over to any person, 178, 179, &c.
14. A Devise of the Land, during the minority of the Son, and for his maintenance and education, until he come of age, is no devising of the Guardianship, 184

### Discent.

1. Children inherit their Ancestors Estates without limit in the right ascending Line, and are not inherited by them, 244
2. In the collateral Lines of Uncle and Nephew, the Uncle as well inherits the Nephew, as the Nephew the Uncle, 244
3. In the case of Aliens nothing interrupts the common course of Descents but *Defectus Nationis*, 268

### Disclaimer.

1. In a *Quare Impedit* upon the Bishops Disclaimer there is a Judgment with a *Cessat Executio quousque*, &c.

### Dismes, See Cythes.

### Disseisor.

1. A Disseisor Tenant in possession may Rebut the Demandant without shewing how he came to the possession which he then hath, but he must shew how the warranty extended to him, 385, 386

### Dispensation, See Title Statutes 14.

1. The Pope could formerly, and the Arch-bishop now can dispense for a plurality, 20, 23
2. How many Benefices a Bishop may retain by Dispensation, 25
3. A Dispensation for years, and good, 24
4. A Dispensation after the Consecration of a Bishop comes too late to prevent the Voidance, 20
5. If a man hath a Benefice with cure, and accepts another without a Dispensation or Qualification, the first becomes void, and the Patron may present, 131, 132

## The Table.

6. No Dispensation can be had for marrying within the Levitical Degrees, 214, 216, 239
7. A Dispensation obtained doth *jure dare*, and makes the thing prohibited lawful, to be done by him who hath it, 333, 336
8. Freedom from punishment is a consequent of a Dispensation, but not its effect, 333
9. What penal Laws the King may dispense with, and what not, 334, 335, 336, &c.
10. Where the Suit is only the Kings for the breach of a penal Law, and which is not to the damage of a third person, the King may dispense, 334, 336, 339, 340
11. Where the Offence wrongs none but the King, he may dispense with it, 344
12. Where the Suit is the Kings only for the benefit of a third person, there he cannot dispense, 334, 336 339, 340
13. Offences not to be dispensed with, 342
14. A Dispensation to make lawful the taking from a man any thing which he may lawfully defend from being taken, or lawfully punish it if it is taken, must be void, 341
15. Dispensations void against Acts of Parliament for maintaining Native Artificers, 344
16. Where the exercise of a Trade is generally prohibited, the Kings license must be without any limitation to him that hath it, to exercise his Trade as before it was prohibited, otherwise it is no license, 346
17. Where the King may dispense generally he is not bound to it, but may limit his Dispensation, 346
18. Where the King can dispense with particular persons, he is not confined to number or place, but may license as many, and in such places, as he thinks fit, 347
19. A Corporation is capable of a Dispensation, 347, 348
20. A Dispensation to a person to keep an Office ( which person is not capable of such Office) is void, 355
21. Where a license *Ex speciali gratia*, is good to dispense with a penal Law without a *Non obstante*, 356

### Distress.

1. A privity is necessary by the common Law between the Distrainer and Distrained, 39
2. Attornment and power to Distrain follows the possession, and not the Use, 43
3. Where a Rent is well vested and there is an Attornment, when ever the Rent is arrear, a Distress is lawful, unless the power is lost, 39
4. Where Rent is arrear, and afterwards the Rent is granted over in Fee, and an Attornment thereunto, here the Grantor hath lost his arrears, and cannot Distrain, 40
5. If a Fine is levied of the Reversion of Land or of Rent to Uses, the *Cessuy que use* may Distrain without attornment, 50, 51 Do.

## The Table.

### Dominion.

1. Dominions belonging to the Crown of *England* cannot be separated from it, but by Act of Parliament made in *England*, 300
2. What are Dominions belonging to the Realm of *England*, though not in the Territorial Dominions of *England*, *ibid.*
3. By what Title the Crown of *England* held *Gascogen, Guyen, and Calais*, 401

### Dower.

1. The wife of a Conizee of a Fine shall not be thereof endowed, because it is but a fictitious Seisin, 41
2. The wife is dowable of a Rent in Fee, 40

### Droit d'Advowson.

1. Where the Writ lies, and for whom, 11, 16
2. In a *Droit d'Advowson* the King may alledge Seisin without alledging any time, 56

### Ecclesiastical Court, See Archbishop, Prohibition.

- T**He Secular Judges are most conuzant of Acts of Parliament, 213
2. The Temporal Judges have conuzance of what marriages are with-

in the Levitical Degrees, and what not, and what are incestuous,

207

3. The Clergy of this Kingdom shall not enact or execute any Canon, Constitution, or Ordinance Provincial, unless they have the Kings license, 329

### Elegit.

1. It lies upon a Recognizance taken in any of the Courts at *Westminster*, or before any Judge out of Term, 102

### Error, See Presidents, Judgment.

1. An erroneous Judgment is a good Judgment to all intents whatsoever, until reversed, 94
2. If an inferiour or superiour Court gives an erroneous Judgment, it is reversible by Writ of Error, 139
3. Where the matter concerns the Jurisdiction of the Court, a Writ of Error lies no where but in Parliament, 396
4. A Writ of Error lies to reverse a Judgment in any Dominion belonging to *England*, 290, 402
5. A Writ of Error lay to reverse a Judgment in *Calais*, 402
6. It lies to reverse a Judgment in *Ireland* 290, 291, 298, 402

### Escheat.

1. Where the Heir at Law dies without heir, the Land escheats, and the Lord's Title will precede any



## The Table.

any future Devise, 270

### Esplees.

1. The profits of a Mine is no Esplees for the Land, but only the Esplees for the Mine it self, 255
2. So likewise for a Wood, the profits of it is no Esplees, but only for the Land only upon which the Wood grows, *ibid.*

### Estates, See Grant.

1. The Law doth not in Conveyances of Estates, admit Estates to pass by Implication, as being a way of passing Estates not agreeable to the plainness required by Law in the transferring of Estates, 261, 262 &c.
2. But in Devises they are admitted with due restrictions, 261, 262, 263, &c.
3. What Executory Devises and contingent Remainders are good, and what not, 272, 273
4. When a new Estate is granted, the privity to the old Estate is destroyed, 43
5. The Estate may be changed, and yet the possession not changed, but remain as formerly, 42
6. An Estate in a Rent-charge may may be enlarged, diminished, or altered, and no new Attornment or privity requisite, 44, 45, 46
7. The Seisin of the Conizee of a Fine is but a meer fiction, and an invented form of Conveyance only, 41
8. His wife shall not be endowed,

neither shall his heir inherit, 41

### Estoppel of Conclusion.

1. A Demise by Indenture of a Term *habendum* from the expiration of another term therein recited, when really there is no such term *in esse*, is no Estoppel to the Lessor or Lessee, but the Lessee may presently enter, and the Lessor grant the Reversion, 82

### Evidence.

1. No evidence can be given to a Jury of what is Law, 143
2. A witness may be admitted to prove the Contents of a Deed or Will, 77
3. The Jury may go upon evidence from their own personal knowledge, 147

### Execution, See Elegit.

1. Lands, Persons, or Goods, ought not to be lyable to Judgments in other manner than they were at the time of the Judgment given, which was where the Court had Jurisdiction which gave the Judgment, 398
2. What Execution shall be sued out upon a Recognizance acknowledged in any of the Courts at *Westminster*, or before a Judge, 103
3. What Execution shall be sued out upon a Statute, 102
4. Upon a Recovery in *England* an Execution doth not lye into *Wales*, 397, 398
5. Per-

# The Table.

5. Perhaps by special Writs to the chief Officer of the King, Execution may be made of Judgments given at *Westminster* in any of his Dominions, 420

Executoꝝ, See Title  
Statute 10, 20.

1. How they are to administer the Testators estate, 96
2. An Executor may refuse, but cannot assign over his Executorship, 182
3. It is no Devastavit in an Executor to satisfy a Judgment obtained upon a simple Covenant, before a debt due by Obligation, 94, 95, 97
4. Where an Action of Debt upon Bond or Judgment is brought against him, he may confess the Action, if there be no fraud in the Case, although he hath notice of a former Suit, 95, 100
5. The Executor may plead an erroneous Judgment in Barr, 94, 97
6. A Recognizance in *Chancery* must be paid before Debts upon simple Contracts, and Debts by Bond, 103
7. It is a Devastavit in an Executor to pay voluntarily a Debt by simple Contract before a Debt by Bond whereof he had notice (and not otherwise) 94, 95
8. It is a Devastavit to satisfy a later Judgment if there are not Assets left to satisfy a former Judgment, 95
9. An Action will not lye against Executors upon a Tally, be-

cause it is no good Specialty, 100

10. The pleading of *Plene administravit prater*, & *plene administravit ultra*, and in what Cases it may be pleaded, and how, 104

Exposition of Words.

<i>Quam diu</i> ,	32
<i>Dum</i> ,	<i>ibid.</i>
<i>Dummodo</i> ,	<i>ibid.</i>
Usually letten,	33, 34
At any time,	34
Or more,	35
More or less,	<i>ibid.</i>
<i>Gurges</i> ,	108
<i>Stagnum</i> ,	<i>ibid.</i>
Appertaining,	108, 109
Reputation,	109
Without any lett,	121
<i>Quiete &amp; pacifice</i> ,	<i>ibid.</i>
Lawfully enjoy,	124
<i>Dedi &amp; Concessi</i> ,	126
Wreck,	168
Derelict,	<i>ibid.</i>
Imported or brought,	171, 172
<i>Per Nomen</i> ,	174, 175
Claim,	188, 193
<i>Una cum</i> ,	197
Nature, what it is,	221, 224
Unnatural,	221, 222, 224
Uncle,	241
<i>Communia</i> ,	255
Remainder,	269 <i>in loco</i> 279
Naturalization,	280
<i>Antenati &amp; Postnati</i> ,	273
Neer of kin, 306, 307, 308, 309, 310	
<i>Malum prohibitum</i> , & <i>malum in se</i> ,	332, 333, 334, &c. 358, 359
Dispensation,	333, 336, 349
Exemption,	349
Commor,	405
Et.	

# The Table.

## Exposition of Sentences.

1. Words which are insensible ought to be rejected, so also words of known signification, so placed in the Deed that they make it repugnant and senseless, are to be rejected equally with words of no signification, 176
2. In things necessary there are no degrees of more or less necessary, 344
3. What appears not to be, must be taken in Law to be as if it were not, 169
4. Lands usually letten shall be intended Lands twice letten, 33
5. Lands which have at any time before been usually letten, how expounded, 34
6. How long time will gain a Reputation to pass a thing as appertaining, 109

## Extinguishment.

1. Extinguishment of a Rent is when it is absolutely conveyed to him who hath the Land out of which it issues; or the Land is conveyed to him to whom the Rent is granted, 199
2. A perpetual union of the Tenancy to the Rent, or Rent to the Tenancy, is an extinguishment of the Rent, 39
3. Where Rent is arrear, and afterwards it is granted over in Fee, and an Attornment thereunto, here the Grantor hath absolutely lost his arrears, and cannot after distrain, 40

## Extent.

1. An Extent is sueable into *Wales*, but a *Ca*, *Sa*, or *Fi. Fa.* is not, 397

## Fee-simple.

1. A Fee-simple determinable upon a Contingent is a Fee to all intents, but not so durable as an absolute Fee-simple, 273
2. *A.* had issue *W. T.* and *R.* and devised to *T.* and his heirs for ever, and if *T.* died without issue living *W.* then *W.* should have the Land, this is a good Fee in *T.* And *W.* hath a Fee in possibility by Executory Devise, if *T.* dyed without issue before him, 272

**Fieri Facias, See Execution.**

## Fine, Fines.

1. A Fine levied without consideration or use expressed, is to the use of the Conizor, 43
2. The Seisin of the Conizee of a Fine is but a meer fiction, and an invented form of Conveyance only, 41, 42
3. The wife in that case shall not be endowed, neither shall it descend to his Heir, 41

## The Table.

### Formedon.

1. The Statute *de Donis* formed a Writ of Formedon in the Descender, for the new Estate Tayl created by that Statute, but makes no mention of a Formedon in the Reverter, as already known in the *Chancery*, 367

### Franchise.

1. Franchises Inferiour and Counties Palatine, are derived out of the Counties by the Kings Grants, where the Kings Writ did run, 418

### Fraud.

1. Wheresoever an Action of Debt, upon Bond or Contract, is brought against an Executor, he may confess the Action, if there be no fraud in the case, although he have notice of a former Suit depending, 35

### Gardian in Socage, See Title Statutes 26.

1. **W**HO is Gardian in Socage at the Common Law, 178, 244
2. What a Gardian may do in his own name, 182
3. Who were *Legitimi tutores*, or Gardians by the Civil Law, 244

4. The Exposition of the Statute made 12 *Car. 2.* 183, 184
5. The Gardian by the Statute of 12 *Car. 2.* doth not derive his authority from the Father, but from the Law, 186
6. The Lands follow the Gardianship, and not the Gardianship the Lands, 178
7. The Gardianship now by the Statute may be till One and twenty years, 179
8. Such a special Gardian cannot transfer the custody of the Ward by Deed or Will to any other, 179, 181
9. The trust is only personal, and not assignable; neither shall it go to the Executors or Administrators, 180, 181
10. If the father appoint the custody until One and twenty, and the Gardian dies, it determines with the death of the Gardian, and is a Condition in Law (if he live so long) 185

### Grants, Grantor, Grantee.

1. The Law doth not in the Conveyances of Estates, admit Estates regularly, to pass by implication: But in Devises they are allowed with due restrictions, 261, 262, &c.
2. A thing so granted as none can take by the Grant, is a void Grant, 199
3. In Grants, words which are insensible ought to be rejected; so likewise words of known signification, when they are so placed in the Deed that they are Repugnant, L I I are



## The Table.

are to be rejected equally with words of no known signification,

176

4. The meaning of the word (appertaining) in a Grant, and how far it will extend, and what it will pass, 108, 109
5. Land in possession cannot pass by the Grant of a Reversion, but by the grant of Land a Reversion will pass, 83
6. By the Grant of *Stagnum & Gurgitem aquarum*, the Soyl of the Pond passes, 107, 108, 109
7. Where by the Deuise of the Farm of *H.* the Mannor of *H.* will well pass, 71
8. To a Grant of a Rent by the Common Law an Attornment is requisite, 39
9. A Lease is made *habendum* for 40 years after the expiration of a Lease made to another person, whereas in truth there is no such Lease, this Lease for 40 years shall commence presently, 73, 74, 80, 81, 83, 84
10. To give or grant that to a man which he had before, is no gift at all; 42

### Grants by the King, See *Non Obstante*, *Pardon*, *Prerogative*.

1. Where the Kings Grant is void (although there be a saving in an Act of Parliament of all the Right of such Grantee) yet that shall not aid it, 332
2. If a Patent is not void in its creation, it remains good after the death of the King that granted it, 332

### *Habendum*.

1. **A** Lease is made *habendum* for Forty years after the expiration of a Lease made to another person, whereas in truth there is no such Lease; this Lease for Forty years shall commence presently, 73, 74, 80, 81
2. A Rent is granted, *habendum* for Seven years after the death of the Grantor, Remainder in Fee, 46

### *Habeas Corpus*.

1. The Writ of *Habeas Corpus* is now the most usual Remedy by which a man is restored again to his liberty, if against Law he hath been deprived of it, 136
2. The Cause of the imprisonment ought as specifically and certainly appear to the Judges upon the Return, as it did appear to the Court, or person authorized to commit, 137, 138, 139, 140
3. A prisoner committed *per mandatum* of the Lord Chancellor, by vertue of a Contempt in *Chancery*, was presently bailed, because the Return was generally for Contempts to the Court, but no particular Contempt exprest, 139, 140
4. The Court of *Common Pleas* or *Exchequer* upon *Habeas Corpus* may discharge Prisoners (imprisoned by other Courts) upon the insufficiency of the Return only, and

## The Table.

- and not for privilege, 154
5. Where a man is brought by *Habeas Corpus*, and upon the Return it appears that he was imprisoned illegally (though there is no cause of privilege for him in the Court) yet he shall not be remanded to his unlawful Imprisonment, 156
6. The *Kings Bench* may bayl, if they please, in all Cases, but the *Common Bench* must remand, if the cause of the imprisonment returned is just, 157

### Heir.

1. Children shall inherit their Ancestors without limitation in the right ascending Line, and are not inherited by them, 244
2. In the collateral Lines of Uncle and Nephew, the Uncle as well inherits the Nephew, as the Nephew the Uncle, *ibid.*
3. The Heir shall never be disinherited by an Estate, given by Implication in a Will, if such Implication be only constructive and possible, but not a necessary Implication, *viz.* such an Implication that the Devisee must have the thing devised, or none else can have it, 262, 263, 268
4. He that is privileged by the Law of *England* to inherit there, must be a Subject of the Kings, 268
5. The four several ways that a man born out of *England* may inherit in *England*, 281
6. How long the Heir shall continue in Ward upon the Devise of his

- Father; and a full Exposition of the Statute of 12 *Car.* 2. 178
7. The Heir of the Conizee of a Fine only, shall take nothing by Discant, 41

### Husband and Wife.

See Baron & Feme.

### Imprisonment, See Title Habeas Corpus.

### Incest.

1. Incest was formerly of Spiritual Conuzance, 212
2. The primitive Christian Church could punish incestuous marriages no other way than only by forbidding them communion with them, 313
3. The Judges have now full conuzance of what Marriages are incestuous, and what not, 207, 209, 210
4. Among the *Hebrews* there was no Divorce for Incest, but the Marriage was void, and the Incest punished as in persons unmarried, *ibid.*

### Incumbent.

1. One Incumbent may sue a Writ of Spoliation against the other, where the Patrons right comes in question, 24
2. If an Incumbent with Cure take another Benefice with Cure, the first is void, and the Patron may present, 21

## The Table.

3. A Bishop may be an Incumbent after Consecration, 24
4. The Kings Confirmation of the *Commendam* transfers no right into the Incumbent, - 26
5. Where the Incumbent doth not read the Articles according to the Statute, he stands *ipso facto* deprived, 131, 132
6. And if he had not subscribed the Articles, he had been never Incumbent, 133

### Infant.

1. Where the Gardianship of an Infant is devised since the Statute of 12 Car. 2. what passes thereby, together with a full Exposition of that Statute, *from 177 to 186*
2. He is capable at Seventeen years of Age of taking Administration in his own name, 93

### Institution and Induction.

1. By Induction into the Rectory, the Parson is seised of all the possessions belonging to his Rectory, 198
2. Institution and Induction is a good Title until a better appears, 7, 8
3. Where after Institution and Induction the party inducted may bring his Ejection, and shall not be put to his *Quare Impedit*, 129, 130, 131

### Jointenants.

1. There can be no Jointenants

- in Occupancy, 189
2. They may release or confirm to each other, and thereupon those priviledges which did belong to both, shall pass to one of them, 45

### Ireland. See Alien, Error.

1. *Ireland* is a conquer'd Kingdom, and appears so by the express words of an Act of Parliament there 292
2. Though *Ireland* hath its own Parliament, yet it is not absolute, & *sui Juris*, *ibid.*
3. What things the Parliament of *Ireland* cannot do, *ibid.*
4. When, *Ireland* received the Laws of *England*, 293, 298
5. What Laws made in the Parliament of *England* are binding in *Ireland*, 293

### Issue.

1. No Issue can be joyned of matter in Law, 143

### Judges of Justices.

1. Where the Law is known, and clear, although it is unequitable and inconvenient, yet Judges must adjudge it as it is, 37, 285
2. But where it is doubtful, and not clear, there they must Interpret it to be as is most consonant to equity, 38
3. Defects in the Law can only be remedied in Parliament, 38, 285
4. Judges must judge according as the Law is, not as it ought to be, but

## The Table.

but if inconveniences necessarily follow out of the Law, the Parliament only can cure them, 285

5. An Opinion given in Court, if not necessary to the Judgment given upon Record, is no Judicial Opinion, no more than a *gratis dictum*, 382
6. But an Opinion, though erroneous, concluding to the Judgment, is a Judicial Opinion, because delivered under the Sanction of the Judges Oath upon deliberation, which assures it is, or was, when delivered, the Opinion of the Deliverer, 382
7. When the King hath constituted any man a Judge, his Ability, Parts, and Fitness for the place are not to be reflected upon, or censured by any other person, being allowed by the King, who only is to judge of the fitness of his Ministers, 138
8. We must not, upon supposition only, admit Judges deficient in their Office, for so they should never do right: Nor on the other side must we admit them unerring in their places, for so they should never do any thing wrong, 139
9. Judges have in all Ages been complained of, and punished for giving dishonest and corrupt judgments, 139
10. A Judge cannot Fine and Imprison a Jury for giving a Verdict contrary to his Directions, 146, 147, 148, 149
11. Judges ought not to abate Writs *ex officio*, 95, 97
12. The Judges direction to the

Jury ought to be upon Supposition, and not Positive; *viz.* if you find the Fact thus, then it is for the Plaintiff; if you find it thus, then for the Defendant, 144

13. The Judge can never direct what the Law is in any controverted matter, until he first knows the Fact, 147

### Judgment, See Error.

1. A Judgment is the Act of the Court, and compulsory to the Defendant, 94, 95
2. Where the Plaintiff makes it appear to the Court that the Defendants Title is not good, but doth not set forth a good Title for himself, the Court shall never give Judgment for him, 60
3. An ill Declaration will not avoid the Judgment, it only makes it erroneous, 93, 94
4. An erroneous Judgment is a good barr for an Executor in an Action brought against him, 94
5. A Judgment given in *England*, ought not to be executed in *Wales*, 398
6. In a *Quare Impedit*, where the Bishop disclaims and the Parson loseth by Default, there shall go a Writ to the Bishop, *Non obstante Reclamatione*, to remove the Incumbent, but with a *Cessat Executio* until the Plea is determined between the Plaintiff and Patron. 6

JURIS.



## The Table.

### Jurisdiction, See Courts, Prohibition.

1. When the Question is of a Jurisdiction in a Dominion belonging to *England*, how to be determined, 418
2. Where ever a Debt grows due, yet the Debtor is indebted to the Creditor in any place where he is, as long as the Debt is unsatisfied, 92
3. It is the Defendant, not the Plaintiff, must take Exceptions to the Jurisdiction of the Court, 93
4. Where the appearance of the Tenant upon the Summons shall not affirm the Jurisdiction of the Court, 405
5. The Temporal Courts may prohibit the Spiritual Courts in Cases of incestuous Marriages, and Marriages within or without the Levitical Degrees, 207

### Jurors, See Verdict, Attaint.

1. Jurors must be returned out of the Vicinage where the cause of Action riseth, 148
2. What is the legal Verdict of the Jury, 150
3. No evidence can be given to a Jury of what is Law, 143
4. The Verdict of the Jury cannot change the Reason of the Law, 101
5. The Jury, and not the Judge, resolve and find what the Fact is, 144
6. A Jury-man swears to what he can infer and conclude from the Te-

stimony of Witnesses, by the act and force of his Understanding, to be the Fact inquired after,

142

7. The Jury may have Evidence from their own personal knowledge, 147
8. Although a Jury find contrary to their Evidence, yet they are not finable, an Attaint only lies against them, 144, 145, 147, 148, 149
9. Neither are they fineable where an Attaint doth not lye, 145
10. A Juror kept his Fellows a day and night without any reason for assenting, and therefore sent to the Fleet, 151
11. A Jury was never punished upon an Information either in Law or the *Star Chamber*, for finding an untrue Verdict, unless Imbracery, Subornation, or the like, were joyned, 152
12. Where the Judges conceive the Jury have been unlawfully dealt withal to give their Verdict, they are finable, 153
13. The Jury can never find *Ignoramus* upon a Tryal, 154

### King, See Grants of the King, Prerogative.

1. No Canon Ecclesiastical can be made without the Kings license and assent, 329
2. The King will not take away another mans Right against his Will, 14
3. The King cannot pardon an Offence

## The Table.

- fence done to a particular person, 333
4. Where the Suit is only the Kings for the breach of a penal Law, and which is not to the damage of a third person, the King may dispense, 334, 336
  5. But where the Suit is the Kings only for the benefit of a third person, and the King is entituled by the prosecution and complaint of such third person, the King cannot release or dispense with such Suit, without the Agreement of such party concerned, 334, 336, 356
  6. If a Title appear for the King, the Court, *Ex officio*, ought to give Judgment for him, though no party, 299
  7. Where the Offence wrongs none but the King, he may dispense with it, 344
  8. What things the King may pardon, but not dispense with, 333, 334, 336, &c.
  9. Offences against penal Laws not to be dispensed with, 333, 334, 342, &c.
  10. Where the King may dispense generally, he is not bound to it, but may limit his Dispensation, if he think fit, 346
  11. Where the King can dispense with particular persons, he is not confined to number or place, but may license as many, and in such places, as he thinks fit, 347
  12. If the Kings Grant is not void in its Creation, it remains good after his death against his Successor, 332
  13. Where the exercise of a Trade

is generally prohibited, the Kings license must be without any limitation to him that hath it, to exercise his Trade, as before it was prohibited, otherwise it is no license, 346

14. The Kings Confirmation of a *Commendamus* transfers no Right to the Incumbent, 26
15. Where in a *Quare Impedit* brought by the King his Title appears to be but a bare Suggestion, he cannot forsake his own Title, and endeavour to destroy the Defendants, 61
16. Where the King presents by Lapse, and hath then other good Title to present, yet it is void, 14
17. Those under the Kings power, as King of *England*, in another Princes Dominions, are under his Laws, 282
18. The Natives of any of the Kings Forreign Plantations are his Majesties Natural Subjects, and shall inherit in *England*, 268 *in loco* 278, 379

### Kings Bench, See Courts.

1. The Court of *Kings Bench* cannot pretend to the only discharging of Prisoners upon *Habeas Corpus*, (unless in case of privilege) for the *Chancery* may likewise do it, 157
2. Upon the Return of *Habeas Corpus*, the *Kings Bench* may, if they please, bayl the prisoner, but the *Common Pleas* must remand him if the cause of the imprisonment returned is just, 157
3. The

## The Table.

3. The *Kings Bench* may quash the Order of Commitment upon a *Certiorari*, 157
4. May grant Prohibitions for encroaching Jurisdiction, *ibid.*

### Lapse.

1. **P**resentation by Lapse makes no severance of the Advowson, 14
2. Where a man accepts a second Benefice with Cure, without a Dispensation or Qualification, the first Benefice is void, and the Patron may present; but if he doth not present, then if it is under value, no Lapse shall incur until there is a Deprivation, and Notice: But if it is above value, then the Patron must present within six months, 131, 132

### Law, See Construction of Law.

1. When a Law is given to any people, it is necessary that it be conceived and published in words which may be understood; for without that it cannot be obeyed, and the Law which cannot be obeyed, is no Law, 305
2. The meaning of the words in any Law are to be known, either from their use and signification, according to common acceptance before the Law made, or from some Law or Institution declaring their signification, 305

3. A Law which a man cannot obey, nor act according to is void, and no Law, 337
4. To do a thing which no Law can make lawful, is *malum in se*, 337
5. Where the Law is known and clear, though it be unequitable and inconvenient, yet Judges must determine as it is, without regarding the unequiteness or inconveniences, 37
6. Where the Law is doubtful, and not clear, the Judges ought to interpret it as is most consonant to equity, 38
7. Defects in the Law can be remedied only in Parliament, 38, 116, 132
8. Whatever is declared by Act of Parliament to be against Gods Law, must be so admitted to be by us, because it is so declared by an Act of Parliament, 327
9. A Law not published, is no more obligative, then a Law only concealed in the mind of the Law-giver, is obligative, 228, 236
10. A lawful Canon is the Law of the Kingdom, as well as an Act of Parliament; and whatever is the Law of the Kingdom, is as much the Law as any thing else that is so, 21, 132, 327
11. It is irrational to suppose men ignorant of those Laws for the breach of which they are to be punished, 208
12. Every thing in one sense is taken for Common Law (if it be Law) when it appears not to be by Act of Parliament, 163
13. It is never prudent to change a Law

## The Table.

Law which cannot be bettered in the Subject matter of the Law,

239

14. A man hath no Right to any thing for which the Law gives no remedy,

253

15. The effect of Law can do more than an act of Law,

280

16. How things become natural by custome,

224

17. What natural Laws are,

226,

227

18. Of transgressing Natural Laws, and in what sense that is to be understood,

226, 227, 228

19. It is not safe in case of a publick Law (as between the Spiritual and Temporal Jurisdiction) to change the Received Law,

220

20. The Law of the Land cannot be altered by the Pope,

20, 21, 132

21. Many Laws made in the time of the Saxon Kings are now received as Common Law,

358

### Lease, Lessor, Lessee, See Title Statute 23.

1. A Demise, having no certain commencement, is void,

85

2. In what cases the Lessee shall bring an Action against his Lessor for breach of Covenant, upon a Covenant of Quiet Enjoyment, without the lawful disturbance of himself, &c: it being a full exposition of that Covenant, when it is either by Law or Express, and general or particular,

from 118

to 128

3. A Demise of Tythe with Land is good within the 13 EA but a De-

mise of Tythe barely is not good,

203, 204

4. A man leases Lands for certain years, *habendum post dimissionem inde factum*, to J. N. and J. N. hath no Lease *in esse*, the Lease shall commence immediately from the Sealing, 73, 74, 80, 81, 83,

84

5. A power is granted to Demise Lands usually letten, Lands which have been twice letten are within this Proviso,

38

6. Which at any time before have been usually letten, that which was not in lease at the time of the Proviso, nor twenty years before, is not within the Proviso, 34, 35, by the Demise of the Farm of H. the Mannor of H. will pass,

71

7. Proviso that the Plaintiff may lease for One and twenty years, reserving the ancient Rents, so long as the Lessees shall pay the Rents, these are words of limitation, and the Non-payment of the Rent determines the term without a Demand,

32

### License, See Title King, Dispensation.

### Limitation.

1. A Limitation determines a Lease without demand of the Rent,

32

2. What words shall be taken to be a Limitation, and no Condition,

32

M m m

Liberty



## The Table.

### Liberty and Selsin.

1. Where a Rectory is granted *Una cum Decimis de D.*, the Tythe which alone cannot pass without Deed, doth pass by the Livery of the Rectory; and without Livery the Tythe will not pass, because it was intended to pass with the Rectory by Livery, 197, 198

### London.

1. The Customes of *London* are confirmed by Act of Parliament, 93
2. How Declarations are in *London*, according to their Customes, *ibid.*

### Marriages. See Title Statute 16.

1. Incest was formerly of Spiritual Conizance, 212
2. The Judges of the Temporal Courts have, by several Acts of Parliament, full conizance of Marriages within or without the Levitical Degrees, 207, 209, 210
3. They have full conizance of what Marriages are Incestuous, and what not, according to the Law of the Kingdom; and may prohibit the Spiritual Courts from questioning of them, 207, 209, 210, 305

4. The Interdicts of Marriage and carnal Knowledge in the Levitical Law, were directed to the men, not to the women, who are interdicted by a consequent; For the woman being interdicted to the man, the man must also be interdicted to the woman; for a man cannot marry a woman and she not marry him, 305
5. A man married his Grand-fathers Brothers wife by the Mothers side, and held lawful, 206, 207
6. A man married his first Wives sisters daughter, and held unlawful; and after a Prohibition a Consultation granted, 247, 321, 322
7. For a man to marry his wives sister, is a Marriage expressly prohibited within the Eighteenth of *Leviticus*, 305
8. What Marriages are lawful, and what not, 210, 218, 219, 305, 306, 307, 308, 309
9. How the words (No Marriages shall be impeached, Gods Law except) shall be understood, 211
10. What Marriages are prohibited within the Levitical Degrees, 214, 215, 306, 307, 308
11. What Marriages are by Gods Law otherwise prohibited, 220, 221
12. Marriages contrary thereunto ought not to be dispensed with, 214, 216
13. Marriages with Cosen Germans lawful, 218, 219
14. All Marriages are lawful which are not prohibited within the Levitical Degrees, or otherwise by Gods Law, 219, 240, 242, 305
15. In

## The Table.

15. In what sense any Marriages and Copulations of man with woman, may be said to be natural, and in what not, 221
16. Marriages forbidden in *Leviticus* lawful before, 222
17. Marriages lawful after restoring the world in *Noah*, *ibid.*
18. Concerning Universal Obligation to the Levitical Prohibitions in cases of Matrimony and Incest, 230
19. What Marriages were usual in old times, 237
20. How simple Fornication was satisfied in the time of *Moses*, *ibid.*
21. Who shall be said to be the near of kin, which are prohibited Marriage, 307, 308, 309, 310, 311
22. What Marriages are by the Matrimonial Table of *England* interdicted, 315, 316, 317, 318
23. Marriages within the Levitical Prohibitions were always unlawful, but Marriages within the Levitical Degrees were not always unlawful, 319, 320, 321
24. How the Levitical Degrees are to be reckoned, 320
25. All Marriages prohibited by the Table, are declared to be within the Degrees prohibited by Gods Law, 328
26. In what the Parochial Matrimonial Table used in *England*, agrees with the *Karait* Rabbins, 311, 312
27. The primitive Christian Church could punish Incestuous Marriages no other wise than by forbidding them the Communion, 313

28. By what Law the primitive Christian Churches conceived themselves obliged, in the matter of Marriage, to observe the Levitical prohibitions strictly and indispensibly, 314
29. Amongst the *Hebrews*, there was no Divorce for Incest, but the Marriage was void, and the Incest punished as in persons unmarried, 313

### Master and Servant.

1. Although there is no Master or Servant originally in Nature, but only parity, yet, after Laws have constituted those Relations, 242
2. A Father cannot be Servant to his Son, 243

### Metropolitan, See Arch-bishop, Ordinary.

### Misrecital, See Lease.

1. Where a Lease is misrecited in the date, and the *habendum* is to be from the date which is misrecited, there the Lease shall commence from the Sealing, 73

### Monopoly.

1. If Exportation or Importation of a Commodity, or Exercise of a Trade is prohibited generally by Act of Parliament, and no cause thereof expressed, a license may be granted to one or more persons, with a *Non obstante*; for by such

## The Table.

general Restraint the Law intended to limit the over-numerous Importers and Traders ; and such general Licenses shall not be accounted Monopolies, 345

2. To avoid a Monopoly the Kings Dispensation upon all prohibitory Laws , must generally be limited by Law, 346

Naturalization, See Title  
Alien.

Non obstante.

1. **I**T is a license to do a thing which at the Common Law might be done without it, but now (being restrained by some Act of Parliament) cannot be done without it, 345, 356
2. Where a license *Ex speciali gratia* is good to dispense with a penal Law without a *Non obstante*, 356

Nusance.

1. Publique Nusances are not *Mala in se*, but *Mala politica & introducta*, 358
2. The King may pardon a transient Nusance, 333
3. An Action will not lye for a Nusance for which no man hath a particular damage, 335, 341
4. If a man have a particular damage by a foundrous way, he is generally without remedy, because it ought to be repaired by

some Township or Vill, against whom an Action will not lye, but an Indictment only, 340

Oath.

1. Upon granting of Administration the Administrator is to take an Oath duly to administer the Estate of the deceased, 96

Occupant and Occupancy.

1. What Natural Occupancy is, 188
2. What Civil Occupancy is, 189
3. An Occupant shall enjoy whatsoever is belonging to that which he occupies, 196
4. No Occupancy begins with the Freehold, but begins by possessing the Land ; and the Law casts the Freehold upon him, 195
5. A Claim without actual possession cannot make a man a Natural Occupant, 188
6. There can be no Occupancy of any thing wherein another hath a Right, 188, 189
7. Two cannot have severally possession of the same thing at one time, 189, 192
8. Of what things there may be an Occupancy, and of what not, 190, 194, 198
9. A man cannot be an Occupant, but of a void possession, or of a possession which he himself hath, 192
10. What

## The Table.

10. What it is that makes an Occupant, 191
11. Tenant for years, or at will, may be an Occupant, 192
12. An Occupant becomes an Assignee in Law to the first Lessee, 204
13. The Occupant is lyable to pay the Rent, 202, 203
14. He hath power to pass over his interest, 205
15. If a man die seised *per antevie* of a Rent, Tythe, &c. or other thing, whereof there can be no Occupancy either directly or by consequence, as adjuncts of something else, by the death of the Grantee; In all these cases the Grant is determined as if there never had been any, 201, 202
16. But when those things are granted in the same Deed, together with other things of which there may be an Occupancy, then they shall be subject to the Occupancy, 202

### Office before Ecclesiasticals, See Inquisition.

1. Principally an Office for the King is as necessary as an Entry for a common person, 153
2. It neither determines any mans Right, neither doth any party put any Tryal upon them, 153
3. An Inquest of Office is not subject to an Attaint, they are only to find naked matter of Fact, 153
4. Where an Office is found, if

the Defendant hath no Title, then the King hath one by his Office, 62

5. No person shall Traverse the Office, unless he makes to himself a good Title, 64

### Office and Officer, See Title Statutes 24.

1. All Offices of Trust must be personally occupied, unless granted to be occupied by a Deputy, 181
2. Offices of personal Trust cannot be assigned, for the Trust is not personal which any man may have, 180
3. An Office of Trust and Confidence cannot be granted for years, 181
4. All Actions brought against the Officers mentioned in 21 Jacobi, must be laid in the proper County; and if the Plaintiff is Non-suited, or Discontinue, or a Verdict against him, they shall have their double costs, 111, 112, 113, 114, 115, 116, 117

### Ordinary, See Administration, Arch-bishop, Lapse.

1. The Ordinary may enforce the Executors to pay Debts upon Contracts, as well as Legacies or Marriage mony, 97
2. Where the Ordinary is to supply the Cure, until the Patron present, 132

3: Where



## The Table.

3. Where the Ordinary disclaims in a *Quare Impedit*, there is a Judgment with a *Cessat Executio quousque, &c.* 6

### Pardon, See Dispensation, King.

1. **A** Pardon frees a man from the punishment due for a thing unlawfully done, 333
2. What Offences committed against Statutes the King may pardon, and what he cannot, 333, 334, 335, &c.
3. The King may pardon a transient Nuisance, but a continued Nuisance cannot be pardoned, so as to acquit the Nuisance-maker for committing them, but the fine or punishment imposed for the doing thereof may be pardoned, 333
4. Forestalling the Market, Ingrossing, or the like, which continue not, but are over as soon as done, until done *de novo* again, may be pardoned like other Offences, so as the persons shall not be impleaded, otherwise than by the persons who have received particular damage, which the King cannot remit, *ibid.*

### Parliament, See Statute.

### Parson and Patron.

1. A Parson is chosen Bishop, his

Benefices are all void, and thereupon the King shall present, 19, 20, 21

2. Where a Benefice becomes void by accepting another without a Dispensation, the Patron is bound to present without Notice, and where not, 131
3. Where the Parson doth not read the Articles, according to the Statute, he stands deprived *ipso facto*, *ibid.*
4. Where the Parson doth not subscribe the Articles, there he is not Incumbent, although he keeps in possession, 133
5. A Church-man cannot make a Lease of the possessions of his Church without Deed, 197

### Perpetuity.

1. Every Fee-simple is a perpetuity, but in the accident of Alienation; and alienation is an incident to a Fee determinable upon a Contingent, 273
2. There is no Law simply against perpetuities, but against an Entail of perpetuities, *ibid.*

### Pleading, See Traverse.

1. If the Falshood in the Defendants plea is neither hurtful to the Plaintiff, nor beneficial to the Defendant, there it shall not hurt the Defendant, 104
2. Where the Defendant pleads a false plea, which falshood is detrimental to the Plaintiff, and beneficial to the Defendant, as by pleading several Judgments, and

## The Table.

- and concluding that he hath not Assets *ultra*, there the Plaintiff may Reply, That one of the Judgments are satisfied; which Replication shall be fatal to the Defendant, 103
3. But to plead, That he hath not *bona & catalla praterquam bona que non sufficient.* to satisfy the Judgments, is void for the Uncertainty; for no Sum being mentioned, no good Issue can be taken upon it, 104
4. So likewise to say, That he hath not Assets *ultra* what will satisfy, &c. is void for Uncertainty, *ibid.*
5. But it is good pleading to say, That he hath not Assets *praterquam bona & catalla ad Valentiam separal. denar. per ipsum in satisfactione separal. indic. solut.* And also, besides Assets to the value of Ten shillings, which are liable to satisfy the Statutes, *ibid.*
6. It is a good plea for an Executor to plead several Judgment, &c. and conclude *quod non habet, nec ad aliquod tempus habuit* any Assets of the Testators *praterquam bona & catalla*, sufficient to satisfy those Judgments, &c., 103
7. To this the Plaintiff must Reply, Assets *ultra*, or that any one of the Judgments are satisfied, *ibid.*
8. The pleading of a special *plene Administravit*, 91
9. In pleading of a Judgment it is not necessary to set forth the whole Record; but to say, That in such a Court such a Judgment was obtained, 92
10. In pleading of a Judgment, it may be as well pleaded *quod recuperaret as recuperet*, 93
11. An erroneous Judgment is a good barr, until reversed by Error, 94
12. How a Recognizance or Statute ought to be pleaded, 102
13. Every Defendant in a *Quare Impedit* may plead *Ne disturbas*, 58
14. The pleading of a Seisin in gross, Appendancy, and Presentation in a *Quare Impedit*, 15
15. The Tenant shall never be received to Counter-plead, but he must make to himself, by his plea, a Title to the Land, and so avoid the Plaintiffs Title alleged by a Traverse, 58
16. A Commoner prescribes for Common for Cattel levant and couchant, *antiquo Messuagio*, which is not good, because Cattel cannot, to a common intent, be levant upon a Messuage only, 152, 153
17. See the form of pleading a Custome to have *solam & separalem pasturam* for the Tenant against the Lord, 252, 253
18. The pleading of *per nomen* in a Grant, and how it shall be taken, 174, 175
- Plu.

## The Table.

### Pluralities, See Title Statute 14, 22.

1. If a man have a Benefice with Cure, whatever the value is, and is admitted and instituted into another Benefice with Cure, having no Qualification or Dispensation, the first Benefice is void, and the Patron may present, 131

### Pope.

1. The Pope could not change the Law of the Land, 20
2. He could formerly grant a Dispensation for a plurality, 20, 23, 24
3. He did formerly grant Faculties, Dispensations for Pluralities, Unions, Appropriations, Commendams, &c. 23

### Prerogative, See King.

1. By the Common Law all Wrecks did belong to the King, 164
2. The extent of the Kings Prerogative is the extent of his power, and the extent of his power is to do what he hath a will to do; according to that, *Ut summa potestatis Regis est posse quantum velis, sic magnitudinis est velle quantum potest*, 357
3. The King may take Issue, and afterwards Demurr, or first Demurr, and afterwards take Issue: Or he may vary his Declaration, but all this must be done

in one Term, 65

4. He may choose whether he will maintain the Office, or traverse the Title of the party, and so take traverse upon traverse, 62, 64

### Prebend and Prebendary.

1. What a Prebendary or Rectory is in the eye of the Law, 197
2. A Prebend or Church-man cannot make a Lease of their Possessions in the right of the Church without Deed, 197

### Prescription, See Modus Decimandi, Custom.

1. What Prescriptions for Commons are good, and what not, 257
2. How Copyholders shall prescribe for Common, 254
3. The Tenant (a Commoner) prescribes against his Lord to have *Solum & separalem pasturam*, this is a void prescription, 354, 355, 356
4. Inhabitants not Corporate cannot prescribe in a Common, 254
5. One Commoner may prescribe to have *Solum & separalem pasturam* against another Commoner, 355

Pre:

## The Table.

### Presentation, See Abbotslon, Ordinary, Parson, Quare Impedit.

1. In a *Quare Impedit* the Plain-  
tiff must alledge a presentation  
in himself, or in those under  
whom he claims, 7, 8, 57
2. So likewise must the Defendant,  
*ibid.* 8
3. What a bare presentation is,  
11
4. A void presentation makes no  
usurpation, 14
5. When the presentation shall make  
an usurpation, *ibid.*
6. Where the King presents by  
Lapse without Title, and yet  
hath other good Title, the pre-  
sentation is void, *ibid.*
7. Where a Parson is chosen a  
Bishop, his Benefices are all  
void, and the King shall pre-  
sent, 19, 20, 21
8. Where a Benefice becomes void  
by accepting another without a  
Dispensation, the Patron is bound  
to present without notice, and  
where not, 131

### Presidents.

1. An extrajudicial Opinion given  
in, or out of Court is no good  
president, 382
2. Presidents without a Judicial  
decision upon Argument, are of  
no moment, 419
3. An Opinion given in Court, if  
not necessary to the Judgment  
given of Record, is no Judicial  
Opinion, nor more than a *gra-*

*tu dictum,*

382

4. But an Opinion, though erro-  
neous to the Judgment, is a Ju-  
dicial Opinion, because deli-  
vered under the Sanction of the  
Judges Oath upon deliberation,  
which assures it is, or was, when  
delivered, the Opinion of the  
Deliverer, 382
5. Presidents of Fact which pass  
*sub silentio* in the Court of *Kings  
Bench* or *Common Pleas*, are not  
to be regarded, 399
6. New presidents are not confide-  
rable, 169
7. Presidents are useful to decide  
Questions, but in Cases which  
depend upon fundamental prin-  
ciples, from which demonstra-  
tions may be drawn, millions  
of Presidents are to no purpose,  
419
8. Long usage is a just medium to  
expound an Act of Parliament,  
169

### Privily, See Estate.

1. A privily is necessary by the  
Common Law to distrain and a-  
vow, between the Distrainor and  
Distrained, 39
2. Such privily is created by At-  
tornment, *ibid.*
3. Where a new Estate is gained,  
the privily of the old Estate is  
lost, 43
4. Where it is not lost between  
Grantor and Grantee of a Rent,  
after a Fine levied by the Gran-  
tee to his own use, *ibid.*

N n n

5. Where



## The Table.

5. Where an Estate in a Rent may be altered, and no new Attornment or privity requisite, 144

### Priviledge.

1. Priviledge lies only where a man is an Officer of the Court, or hath a prior Suit depending in the *Common Pleas*, and is elsewhere molested, that he cannot attend it, 154
2. All Officers, Clerks, Attorneys of the *Common Pleas*, and their Menial Servants, shall have their Writ of Priviledge, 155

### Process.

1. No Process shall issue from hence into *Wales*, but only Process of Outlawry and Extent, 396, 397
2. A *Fieri Facias*, *Capias ad satisfaciendum*, or other Judicial Process, shall not go from hence thither, 397
3. Process in *Wales* differ from Process in *England*, 400

### Prohibition, See Title Marriage.

1. Prohibitions for encroaching Jurisdiction are as well grantable in the *Common Pleas* as *Kings Bench*, 157, 209
2. A man was sued in the Spiritual Court for having married with his Fathers brothers wife, and a Prohibition was granted, 206, 207, &c.
3. The Judges have full conizance of Marriages within or without

the Levitical Degrees, 207, 220

4. They have conizance of what Marriages are incestuous, and what not; and may prohibit the Spiritual Court from questioning of them, *ibid.*
5. How the suggestion upon the Statute of 32 H. 8. concerning Marriages, must be drawn, to bring the matter in question, 247

### Proof, See Witnesses, Evidence.

1. A witness shall be admitted to prove the Contents of a Deed or Will, 77

### Property.

1. In Life, Liberty, and Estate; every man who hath not forfeited them, hath a property and right which the Law allows him to defend, and if it be violated, it gives an Action to redress the wrong, and to punish the wrong-doer, 337
2. To violate mens properties is never lawful, but a *malum in se*, 338
3. But to alter or transfer mens properties, is *no malum in se*, *ibid.*

### Proviso.

1. A power is granted to make Leases of Lands usually letten, Lands which have been twice letten are within this proviso, 33
2. Of

## The Table.

2. Of Lands which have at any time before been usually letten, that which was not in Lease at the time of the proviso, nor twenty years before, is out of the power, 34

### Possession.

1. He that is out of possession, if he brings his Action, must make a good Title, 8
2. Where one man would recover any thing from another, it is not sufficient to destroy the Title of him in possession, but you must prove your own to be better than his, 58, 60
3. When a man hath gotten the possession of Land that was void of a Proprietor, the Law casts the Freehold upon him, to make a sufficient Tenant to the Precipe, 191
4. Prior possession is a good Title against him, who hath no Title at all, 299
5. A separate possession of one and the same Land can never be in two persons at one and the same time, 42, 47
6. By a Fine the Estate may be changed, although the possession is not changed, 42, 43
7. The Conuzee of a Rent granted by Fine to Uses, cannot have any actual Seisin nor be in possession since the 27 H.8. 49

### Quare Impedit.

1. **W** Here in a *Quare Impedit* the Plaintiff and Defendant are both actors, 6, 7, 8, 58
2. The Plaintiff in his Count must alledge a presentation in himself, or in those from whom he claims, 7, 8, 17, 57
3. So likewise must the Defendant, because they are both Actors, 7, 8, 57, 60
4. The Plaintiff must recover by his own strength, and not by the Defendants weakness, 8, 58, 60
5. Where the King, or a common person, in a *Quare Impedit* sets forth a Title, which is no more than a bare Suggestion, he shall not then forsake his own, and endeavour to destroy the Defendants Title, 61
6. In all *Quare Impedit*s the Defendants may traverse the presentation alledged by the Plaintiff, if the matter of Fact will bear it, 16, 17
7. But the Defendant must not deny the presentation alledged, where there was a presentation, 17
8. Where the Presentation, and not the Seisin in gross of the Advowson or Appendancy, is traversable, 10, 11, 12, 13
9. When the Seisin in gross or appendancy is traversable, 12
10. An Incumbent is elected Bishop, Nnn 2 and

## The Table.

and before Consecration he obtains a Dispensation in *Commendam Retinere*, he is afterwards consecrated, and dyes, the Patron shall present, and not the King, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27

11. If a man, who hath a Benefice with Cure, accepts of another without Dispensation or Qualification, the first Benefice is void, and the Patron may present; and his Clerk, who is admitted, instituted, and inducted, may bring his Action of Trespas or Ejectment, 129, 130, 131

12. All *Quare Impedit* for disturbance to Churches within the Lordships Marchers of Wales, shall be brought in England in the next adjoining County, 409, 410

13. Judgment with a *Cessat Executio* upon the Bishops Disclaimer, 6

14. Where the Parson, Patron, and Ordinary are sued in a *Quare Impedit*, and the Ordinary disclaims, and the Parson loofeth by default, the Plaintiff shall have Judgment to recover his presentation, and a Writ to the Bishop to remove him with a *Cessat Executio*, until the plea is determined between the Plaintiff and Patron, *ibid.*

### Rebutter, See Title Warranty.

1. **W**HO may Rebut, 384
2. The difference between a Rebutter and Voucher, 385, 386, 387
3. Whether the Tenant in possession may Rebut without shewing how he came to the possession, 385
4. Whether a Rebutter may be when the warranty is determined, 387
5. How many several sorts of persons may Rebut, and how those that come in *ex institutione & dispositione legis* may Rebut, 390, 391, 392

### Recital.

1. The Recital of one Lease in another is not a sufficient proof that there was such a Lease as is recited, 74, 75

### Recognizance, See Title Statutes, 8.

1. The *Chancery*, and all the Courts at *Westminster*, had before the Statute of *Adam Burrel*, and still have power to take Recognizances, 102
2. So likewise may every Judge take a Recognizance in any part of *England*, as well out of Term as in Term, 103
3. Where a Recognizance taken before the Chief Justice of the *Com-*

## The Table.

*Common Pleas* is in the nature of a Statute Staple, 102

4. Execution upon such Recognizances are not as upon Statutes, but by Elegit, *ibid.*

### Record.

1. How a Record is to be pleaded, 92

**Recovery and Common Reco-**  
**very, See Title Statutes 13.**  
**See Voucher, Warrant.**

1. Where a Recovery (against its nature) shall be a Forfeiture, because it is taken as a common Conveyance, 51
2. A Rent may arise out of the Estate of *Cestuy que use* upon a Recovery, which was to have risen out of the Estate of the Recoverer, 51

**Release.**

1. Joyntenants may release and confirm to each other, 45

**Remainder, See Title Warrant.**

1. A Remainder must depend upon some particular Estate, and be created at the same time with the particular Estate, 269
2. A Remainder cannot depend upon an absolute Fee simple, 269, 367
3. If Land is devised to A. and his Heirs as long as B. hath Heirs of his body, the Remainder is

ver; this is good in a Devise,  
not as a Remainder, but as an  
Executory Devise, 270

4. A Remainder in Fee upon a Lease for years, 46  
5. The Statute *de Donis* restrains not the warranty of Tenant in Tayl from barring him in the Remainder in Tayl by his warranty descending upon him, 367, 377

### Rent.

1. By the Common Law there ought to be an Attornment to enable the Distraitor to make a good Avowry upon a Distress for Rent, 39
2. Where a Rent is well vested, and there is an Attornment, when ever the Rent is arrear, a Distress is lawful, unless the power is lost, *ibid.*
3. An Estate in a Rent-charge may be enlarged, diminished, or altered, and no new Attornment or privity requisite, 44, 45, 46
4. The power to distress may be lost { by a perpetual Union  
Suspension *pro tempore*  
Dying without Heir  
Granting of it upon Condition  
and by a granting over } 39
5. The several things that a Rent is subject to, 40
6. Rent is granted *pur auter vie*, the Grantee dies, the Rent is thereby determined, 200, 201
7. Where Rent is arrear, and afterwards it is granted over in Fee, and an Attornment thereupon



## The Table.

- upon, here the Grantor hath lost his arrears, and cannot afterwards distrain, 40
8. A Rent may arise out of the Estate of *Cestuy que use*, upon a Recovery, 52
9. There can be no Occupancy of a Rent, 200

### Reversion, See Title Warrant.

1. By the grant of a Reversion, Lands in possession will not pass, but by the grant of Lands a Reversion will pass, 83
2. If Tenant for life alien with warranty, which descends upon the Reversioner, such alienation with warranty is not restrained by the Statute *de Donis*, 370
3. An alienation with warranty, which shall hinder the Land from reverting to the Donor or his Heirs, is expressly forbidden by the Statute *de Donis*, 374

### Right, See Title Action.

1. Where there can be presumed to be no remedy, there is no right, 38

### Seisin.

1. The profits of all and every part of the Land, are the Esplees of the Land, and prove the Seisin of the whole Land, 255

2. In an Entry *for Disseisin*, or other Action, where Esplees are to be alledged, the profits of a Mine will not serve, 254

### Spoliation.

1. The Writ of Spoliation lyes for one Incumbent against the other, where the Patrons right comes in question, 24

### Statute, See Recognizance.

1. A Recognizance taken before the Chief Justice of the *Common Pleas* in the nature of a Statute Staple, 102

### Statutes in general.

1. Where an Act of Parliament is dubious, long usage is a just medium to expound it by; and the meaning of things spoken and written must be as hath been constantly received by common acceptation, 169
2. But where usage is against the obvious meaning of an Act, by the vulgar and common acceptation of words, then it is rather an oppression, then exposition of the Act, 170
3. When an Act of Parliament alters the Common Law, the meaning shall not be strained beyond the words, except in cases of publick utility, when the end of the Act appears to be larger than the words themselves, 179
4. Secular judges are most conizant

## The Table.

- zant in Acts of Parliament, 213
5. When the words of a Statute extend not to an inconvenience rarely happening, but doth to those which often happen, it is good reason not to strain the words further than they will reach, by saying it is *casus omissus*, and that the Law intended *quæ frequentius accidunt*, 373
6. But where the words of a Law do extend to an inconvenience seldom happening, there it shall extend to it as well as if it happens more frequently, 373
7. An Act of Parliament, which generally prohibits a thing upon a penalty which is popular, or only given to the King, may be inconvenient to diverse particular persons, in respect of person, place, time, &c. For this cause the Law hath given power to the King to dispense with particular persons, 347
8. Whatsoever is declared by an Act of Parliament to be against Law, we must admit it so; for by a Law, *viz.* (by Act of Parliament) it is so declared, 327
9. Where the Kings Grant is void in its creation, a saving of that Grant in an Act of Parliament shall not aid it, 332
10. How an Act of Parliament may be proved there hath been such an Act, where the Roll is lost, 162, 163, 404, 405, 407
11. An Act of Parliament in *Ireland*, cannot effect a thing which could not be done without an

Act of Parliament in *England*, 289

12. Distinct Kingdoms cannot be united but by mutual Acts of Parliament, 300
13. A repealed Act of Parliament is of no more effect, than if it had never been made, 325

### Statutes.

1. The Statute of *Merton*,  $\left\{ \begin{smallmatrix} (1) \text{ Merton,} \\ \text{cap. 4.} \end{smallmatrix} \right.$  which gave the owner of the Soyl power to approve Common, did not consider whether the Lord was equally bound to pasture with his Tenants, or not; but it considered that the Lord should approve his own Ground, so as the Commoners had sufficient, 256, 257
2. The inconveniences before the making of the Statute, and the several remedies that were provided by it, 257
1. The *Antique Custumæ* upon Woolls,  $\left\{ \begin{smallmatrix} (2) \text{ instm. 1.} \\ \text{3 E. 1.} \end{smallmatrix} \right.$  Woolfells, and Leather, were granted to E. 1. by Parliament, and therefore they are not by the Common Law, 162, 163
1. Attaints in Pleas real  $\left\{ \begin{smallmatrix} (3) \text{ instm. 1.} \\ \text{cap. 38.} \end{smallmatrix} \right.$  were granted by this Statute, 146
1. The *Quare Ejecis infra terminum* is given by this Statute, for the recovery of the Term against the Feoffee; for an Ejectment lay not

## The Table.

- not against him, he coming to the Land by Feoffment, 127
- (5) Statute of Gloucester. } 1. Restrained warranties from binding, as at Common Law, 366, 377
2. Before this Statute all Warranties which descended to the Heirs of the Warrantors, were barrs to them, except they were Warranties which commenced by Disseisin, 366
3. The reason why the warranty of Tenant in Tayl, with assents, binds the right of the Estate Tayl is in no respect from the Statute *de Donis*, but by the equity of the Statute of *Gloucester*, by which the Warranty of the Tenant per Curtesie barrs not the Heir; for his Mothers Land, if his Father leaves not assents to descend, 365
4. If this Statute had not been made, the lineal Warranty of Tenant in Tayl had no more bound the right of the Estate Tayl by the Statute *de Donis*, with assents descending, than it doth without assents, *ibid.*
- (6) *Wylm. de Donis*. } 1. All Issues in Tayl within this Statute, are to claim by the Writ purposely formed there for them, which is a *Formedon* in the Descender, 369
2. it intended not to restrain the alienation of any Estates, but such as were Fee-simples at the Common Law, 370
3. This Statute intended not to preserve the Estate for the Issue, or
- the Reversion for the Donor, absolutely against all Warranties, but against the alienation, with, or without Warranty of the Donee and Tenant in Tayl only, 369
4. Therefore if Tenant for life alien with Warranty, which descended upon the Reversioner, that was not restrained by the Statute, but left at the Common Law, 370
5. By this Statute the Warranty of Tenant in Tayl will not barr the Donor or his Heir, of the Reversion, *ibid.*
6. The Donee in Tayl is hereby expressly restrained from all power of alienation, whereby the Lands entayled may not revert to the Donor for want of issue in Tayl, 371
7. See a further Exposition upon this Statute, from fol. 371 to 393
1. *Wales*, after the Conquest of it by Edward the First, was annexed to *England*, *Jure proprietatis*, and received Laws from *England* as *Ireland* did, and had a *Chancery* of their own, and was not bound by the Law of *England*, until 27 H. 8. 300, 301, 399, 400
- (7) Statute de Rotund, 12 Ed. } *Vide postea* 9, 17, 18.
2. Although *Wales* became of the Dominion of *England* from that time, yet the Courts of *England* had nothing to do with the Administration of Justice there, in other manner than

## The Table.

than now they have with the *Barbadoes, Jersey, &c.* all which are of the Dominions of *England*, and may be bound by Laws made respectively for them by an English Parliament, 400

See for a further Exposition, 401, 402, &c.

(8) *Allen* } 1. Recognizances for  
*Burnell, 13 E. 1.* } Debt were taken before this Statute by the Chancellor, two Chief Justices, and Justices Itinerants; neither are they hindred by this Statute from taking them as they did before, 102

(9) 28 E. 3. c. 2. } 1. Tryals and Writs  
*concerning* } in *England* for Lands  
*Wales.* } in *Wales*, were only for Lordships Marchers, and not for Lands within the Principality of *Wales*, for the Lordships and Marchers were of the Dominion of *England*, and held of the King in *Capite*, 411

(10) 31 E. 3. c. 3. } 1. Though Executors  
*cap. 11. Concerning* } and Administrators are not compelled by the Common Law to answer Actions of Debt for simple Contracts, yet the Law of the Land obligeth payment of them, 96

2. Upon committing Administration, Oath is taken to administer truly, which cannot be without paying the Debts, 96

3. Oath is likewise taken to make a true account to the Ordinary of what Remains, after all Debts,

Funerals, and just Expences deducted, 96

1. This Statute granted { (11) 34 E. 3.  
Attaints in personal } c. 7 of Attaints.  
Actions, 146

1. Those born in *Ireland*, are subject to, { (12) 2 R. 6.  
land, are subject to, } c. 4  
and bound by, the Laws of *England*, as those of *Calais, Gascony*, and *Guien* were, 293

1. If a Common Recovery had been to { (13) 7 H. 8. c. 4.  
Uses of Lordships and Mannors before the Statute of the 27 H. 8. the Recoverors had no remedy to make the Tenants Attorn (for a *quid Juris clamor* would not lye upon a Recovery before the Statute of 27 H. 8.) which did give remedy, 48

1. If a man have a Benefice with Cure, { (14) 21 H. 8. c. 2.  
whatever the value be, and is admitted and instituted into another Benefice with Cure, of what value } *Postea 15.*  
soever, having no Qualification or Dispensation, the first is *ipso facto* void, and the Patron may present another, 131

2. But if the Patron will not present, then if under value, no Lapse shall incur until Deprivation of the first Benefice and notice, but if of the value of Eight pounds, the Patron, at his peril, must present within the six Months, 131

O o o 1. The



## The Table.

- |  |   |
|--|---|
| <p>(15) 25 H. 8. } 1. The Pope could<br/>cap. 21. of Dis- } formerly, and the<br/>pensations. } Arch-bishop now<br/>Ante 14. } can sufficiently di-<br/>spense for a plurality by this Sta-<br/>tute, 20</p> <p>2. A Rector of a Church dispensed<br/>with according to this Statute,<br/>before he is consecrated Bishop,<br/>remains Rector, as before, after<br/>Consecration, 24</p> <p>(16) 25 H. 8. } 1. Neither by this Act,<br/>c. 22. 28 H. 8. } or 28 H. 8. cap. 7. no<br/>c. 7. 28 H. 8. } Marriage prohibited<br/>c. 16. 32 H. 8. } before, either by<br/>c. 38. of Mar- } Gods Law, or the<br/>riages. } Canon Law, differenced from it<br/>is made lawful, 216, 325</p> <p>2. That the Marriages particularly<br/>declared to be against Gods<br/>Law, cannot be dispensed with,<br/>but other Marriages, not parti-<br/>cularly declared to be against<br/>Gods Law, are left <i>Statu quo</i><br/><i>primi</i>, as to the Dispensations,<br/>216, 325</p> <p>3. That neither of these Acts gave<br/>Jurisdiction to the Temporal<br/>Courts concerning Marriages,<br/>more than they had before, but<br/>were Acts directory only to the<br/>Ecclesiastical proceedings in mat-<br/>ters of Marriage, 216</p> <p>4. Neither of these Acts declare,<br/>That the Degrees rehearsed in<br/>the said Acts, thereby declared<br/>to be prohibited by Gods Law,<br/>are all the Degrees of Marriage<br/>prohibited by Gods Law, <i>ibid.</i></p> <p>5. The Levitical Degrees, <i>quatenus</i><br/>such are set forth by no Act of<br/>Parliament, but Marriages which</p> | <p>fall within some of those De-<br/>grees are said to be Marriages<br/>within the Degrees prohibited<br/>by Gods Law by 28 H. 8. c. 7.<br/>and 28 H. 8. c. 16. 319</p> <p>6. The 32 H. 8. c. 38. prohibits<br/>the impeaching of Marriages on-<br/>ly which are absolutely within<br/>the Levitical Degrees, leaving<br/>all other to Spiritual Jurisdic-<br/>tion, as before that Act, 320</p> <p>7. A Marriage with the Grandfa-<br/>thers brothers wife by the mo-<br/>thers side, is a lawful Marri-<br/>age by the 32 H. 8. c. 38. 206,<br/>207</p> <p>8. The marriage of the Husband<br/>with the Wives sister, or the Wives<br/>sisters daughter, is prohibited with-<br/>in the Levitical Degrees, 322,<br/>323</p> <p>9. The 28 H. 8. cap. 16. makes in-<br/>valid all Licenses, Dispensati-<br/>ons, Bulls, and other Instru-<br/>ments purchased from Rome,<br/>217</p> <p>10. This Statute of 25 H. 8. is<br/>Repealed by the 28 H. 8: but<br/>not for the matter of Marriages<br/>there prohibited, 215</p> <p>11. The Statute of 1 &amp; 2 Phil.<br/>&amp; Mar. doth not Repeal the<br/>28 H. 8. cap. 7. entirely, but<br/>only one Clause of it, 324,<br/>327</p> <p>12. Some parts of 32 H. 8. c. 38.<br/>are Repealed, 218</p> <p>1. By this Statute { (17) 26 H. 8.<br/>power was given to } Concerning<br/>the Kings President } Wales.<br/>and Council in the }<br/>Marchers of Wales, } Ante 7, 9.<br/>Postea 18.</p> |
|--|---|

in

## The Table.

in several Causes, as

to { Indict,  
Outlaw,

Proceed a-  
gainst { Traytors,  
Clippers of Mony,  
Murderers and other  
Felons,

within the Lordships Marchers  
of *Wales*, to be indicted in the  
adjoining County. But this did  
not extend to the Principality of  
*Wales*, 413

(18) 27 H. 8. } 1. The alteration which  
concerning } was made by this  
*Wales*. } Statute, as to *Wales*,  
414, 415

2. To what Counties the Lordships  
Marchers of *Wales*  
*Act 7, 9, 18.* are now annexed by this  
Statute, 415

(19) 27 H. 8. } 1. A Use cannot arise  
of Uses. } where there is not  
a sufficient Estate in possession,  
49

2. This Statute is properly to  
give the possession to him who  
had not the possession, but the  
use only, *viz.* the possession  
which he wanted before to the  
use which he had before, in  
such manner as he hath the use,  
42

3. It was never the intent of the  
Statute to give the possession to  
fictitious Conuzees, in order to  
a form of Conveyance; but the  
Statute brings the new uses,  
taised out of a feigned posselli-

on in the Conuzee, to the real  
possession, which operates ac-  
cording to their intent to change  
their Estate, 42

4. If an Estate for life had been  
granted to the use of a man and  
his Heirs, an Estate in Fee  
could not rise out of it by this  
Statute, 49

5. The principal use of this Sta-  
tute, especially upon Fines le-  
vied, is not to bring together a  
possession and a use, but to in-  
troduce a general form of Con-  
veyance, by which the Conu-  
zors in the Fine may execute  
their purposes at pleasure, by  
transferring to Strangers, en-  
larging or diminishing their E-  
states, without observing the  
strictness of Law for the possession  
of the Conuzee, 50

6. The Conuzee of a Rent grant-  
ed by Fine to uses, cannot have  
any actual seisin, or be in pos-  
session of such Rent since this  
Statute, 49

7. *A.* makes a Feoffment with  
Warranty to the use of himself  
for life, Remainder to his wife  
for life, Remainder to the use  
of his right Heirs, when by this  
Statute the possession is brought  
to these uses, the Warranty  
made by *A.* to the Feoffees and  
their Heirs, is wholly destroyed,  
389

1. This Statute gives { (20) 32 H. 8.  
Remedy for recove- } c. 32. concerning  
ry of such Debts by } Executors.  
Executors as were due to the  
Testator, and for which there  
was

## The Table.

was no remedy before (*viz.*) the Tenants did retain in their hands, arrearages of Rents, whereby the Executors could not pay the Testators Debts,

48

(21) 7 E. 6. }  
cap. 5. selling of  
Wines.

1. This Statute never intended that no Wine should be sold, nor that it should be with great restraint sold, but every man might not sell it. And since it restrains not the Kings power to license the selling of Wine, it is clear the King may license, as if the Act had absolutely prohibited the selling of Wine, and left it to the King to license, as he thought fit,

355

2. The intent of the Act being, That every man should not sell Wine that would, his Majesty could not better answer the ends of the Act, than to restrain the sellers to Freemen of London, to the Corporation of Vintners, men bred up in that Trade, and serving Apprenticeships to it,

*ibid.*

(22) 13 Eliz. 12 }  
Not reading  
the Articles.

1. Immediately upon not reading the Articles, the Incumbent is by this Statute deprived *ipso facto*,

132

2. Upon such Deprivation the Patron may present, and his Clerk ought to be admitted and instituted; but if he do not, no Lapse incurs until after Six months after notice

of such Deprivation given to the Patron,

132

3. Where the Incumbent subscribes the Articles upon his Admission and Institution, that makes him perfect Incumbent *pro tempore*,

133

4. But if he hath a Benefice, and afterwards accepts another, and doth not subscribe, nor read the Articles, then he never was Incumbent of the second, and consequently never accepted a second Benefice to disable him from holding the first, 132, 133,

134

1. That all Leases by Spiritual persons of Tythe, &c. parcel of their Spiritual Promotions,

(23) 13 Eliz. cap. 10. Concerning Leases to be made by Ecclesiastical persons.

other than for One and twenty years, or three Lives, reserving the accustomed yearly Rent, shall be void.

2. This Statute intended that Leases in some sense might be made of Tithes for One and twenty years, or three Lives, and an ancient Rent Reserved, but of a bare Tythe only a Rent could not be reserved, for neither Distress nor Assise can be of such a Rent,

203, 204

3. Therefore a Lease of Tythe and Land, out of which a Rent may issue, and the accustomed Rent may be reserved, must be good within the intent of the Statute,

204

1. The

## The Table.

(24) 7 Jac.  
cap. 5. 21 Jac.  
cap. 12. For Of-  
ficers to be sued  
in the proper  
County.

1. The question upon these Acts was, Whether an Officer, or any in their assistance, that shall do any thing by colour of, but not concerning their Office, and be therefore impleaded, shall have the benefit of these Acts.
2. Or if they are impleaded for any thing done by pretence of their Offices, and which is not strictly done by reason of their Office, but is a mis-feazante, Whether they may have the like benefit?
3. Without this Act the Action ought to be laid where the Fact was done, and the Act is but to compel the doing of that where an Officer is concerned, that otherwise *Fieri debuit*, 114
4. The Statute intends like benefit to all the Defendants (where the Fact is not proved to be done where the Action is laid) as if the Plaintiff became Non-suit, or suffered a Discontinuance (*viz.*) that they should have double costs, 117

(25) 12 Car. 2.  
cap. 4. For  
granting Tan-  
nage and  
Poundage to  
the King.

1. Those Wines which are to pay this Duty, according to the Act, must be Wines brought into Port, as Merchandise, by his Majesties Subjects or Strangers, 165
2. But Wines which are by their kind to pay Duty, if they shall be brought into Ports or Places

of this Kingdom, neither by his Majesties Subjects, nor Aliens, they are not chargeable with this Duty, *ibid.*

3. If they are not brought into the Ports and Places as Merchandize, *viz.* for Sale, they are not chargeable with the Duty, 165, 170
4. Wines coming into this Kingdom, as Wreck, are neither brought into this Kingdom by his Majesties Subjects nor Strangers, but by the Wind and Sea, 166
5. Wreck'd Goods are not brought into this Kingdom for Merchandise, *viz.* for Sale, but are as all other the Native Goods of the Kingdom, for sale, or other use, at the pleasure of the owner, *ibid.*
6. All Goods chargeable with the Duties of this Act, must be appropriated by a natural born Merchant, or Merchant Alien, and accordingly the greater and lesser Duty is to be paid, 166, 168
7. All Goods subject to this Duty, may be forfeited by the disobedience and mis-behaviour of the Merchant-proprietor, or those entrusted by him, 167

1. The intent of this Statute is to privilege the Father against common Right, to appoint the Guardian of his Heir, and the time of his Wardship under One

(26) 12 Car. 2.  
cap. 24. To en-  
able the Father  
to devise the  
Guardianship  
of his Son.



## The Table.

- One and twenty, 179
2. Such a special Guardian cannot transfer the custody by Deed or Will to any other, 179
  3. He hath no different Estate from a Guardian in Soccage, but for the time the of Wardship, 179
  4. The Father cannot by this Act give the custody to a Papist, 180
  5. If the Father doth not appoint for how long time under One and twenty years his Son shall be in Ward, it is void for Uncertainty. 185
  6. The substance of the Statute, and sense thereof is, That whereas all Tenures are now Soccage, and the Law appoints a Gardi- an till Fourteen: yet the Father may nominate the Gardian to his Heir, and for any time, until his Age of One and twenty, and such Gardian shall have like remedy for the Ward as Gardian in Soccage at the Common Law, 183

### Superfedeas.

1. If a priviledged person, as an Attorney, &c. or his Menial Servant, is sued in any Jurisdic- tion forreign to his priviledge, he may have a Superfedeas, 155

### Surplusage.

1. Surplusage in a special Verdict, 78

### Suspension.

1. A Suspension of Rent is when either the Rent or Land are so conveyed, not absolutely and finally, but for a certain time after which the Rent will be a- gain revived, 199
2. A Rent may be suspended by Unity for a time, and afterwards restored, 39

### Tayl, See Title Warranty.

1. SEE an Exposition upon the the Statute *de Donis*, 370, 371, 372, &c.
2. What shall be a good Estate Tayl by Implication in a Devise, 262
3. *A.* having Issue *Thomas* and *Mary*, deviseth to *Thomas* and his Heirs for ever; and for want of Heirs of *Thomas*, to *Mary* and her Heirs: This is an E- state Tayl in *Thomas*, 269, 270
4. A Copyholder in Fee surrenders to the use of *F.* his Son, and *J.* the Son of *F.* and of the long- est liver of them; and for want of Issue of *J.* lawfully begotten, the Remainder to *M.* here it being by Deed, *J.* had only an Estate for Life, but had it been by Will, it had been an Estate Tayl by Implication, 261
5. The

## The Table.

5. The Warranty of the Tenant in Tayl descending upon the Donor or his Heirs, is no barr in a Formedon in the Reverter brought by them, although it be a Collateral Warranty, 364, 365

6. The lineal Warranty of Tenant in Tayl shall not bind the Right of the Estate Tayl by the Statute *de Donis*, neither with or without Affets descending, 365

**Tenures, See Title Estates.**

**Testament, See Devises.**

1. A Custody (as a Gardianship in Socage) is not in its nature Testamentary, it cannot pay Debts nor Legacies, nor be distributed as Alms, 182

### Title.

1. When you would recover any thing from me, it is not sufficient for you to destroy my Title, but you must prove your own to be better than mine, 58, 60

2. In a *Quare Impedit*, if the Defendant will leave the general Issue, and controvert the Plaintiffs Title, he must do it by his own Title, 58

3. The Plaintiff must recover by his own strength, and not by the Defendants weakness, 8, 58

4. Priority of possession is a good Title against him who hath no Title at all, 299

5. No man can Traverse an Office, except he can make himself a good Title, 64

### Trade.

1. The Law permits not persons, who have served Seven years to have a way of livelyhood, to be hindred in the Exercise of their Trades, in any Town or part of the Kingdom, 356

### Traverse.

1. No person shall Traverse an Office, unless he can make himself a good Title, 64

2. When in a *Quare Impedit* the Defendant Traverseth any part of the Plaintiffs Count, it ought to be such part as is inconsistent with his Title, and being found against the Plaintiff, destroys his Title, 8, 9, 10

3. Where the presentation, and not the seisin of the Advowson is to be traversed, 9, 10, 11, 12

4. Where the Presentation, and not the Appendancy is traversable, 10, 11, 15

5. Where the Seisin in Gross or Appendancy is Traversable, 12, 13

6. The Appendancy is well Traversed, when it is all the Plaintiffs Title to present, and inconsistent with the Defendants, 13, 15

7. Where

## The Table.

- |  |  |
|--|--|
| <p>7. Where either the Appendancy or Presentation may be Traversed, 15</p> <p>8. Where neither the Seisin in Gross, nor Appendancy, shall be Traversed, but only the Vacancy, 16</p> <p>9. Where the King may take a Traverse upon a Traverse, which regularly a common person cannot do, but where the first Traverse tendered by the Defendant is not material to the Action brought, 62</p> <p>10. Where the King may refuse to maintain his own Title, which is Traversed by the Defendant, and take a Traverse to the Title made by the Defendant, 62, 64</p> | <p>2. How Dominions, Leagues, and Truces are to be tryed, 288</p> <p>3. An Issue arising out of the Jurisdiction of the Courts of <i>England</i>, although it arise within the Dominions of <i>England</i> out of the Realm, shall not be tryed in <i>England</i>, 404</p> <p>4. If a Signiory in <i>Wales</i> (that is not part of the Principality) be to be tryed, it must be tryed by the Common Law; but if Land within the Signiory is to be tryed, it must be tryed within the Mannor there, 407</p> <p>5. A person naturalized in <i>Ireland</i>, commits Treason beyond the Seas, where no local Allegiance is due to the King, how and where he shall be tryed, 291, 292</p> |
|--|--|

### Trespas.

1. By the ancient Law it was adjudged in Parliament, no man ought to be condemned in a Trespas *de precepto* or *auxilio*, if no man were convicted of the Fact done, 115, 116
2. Action of Trespas against Officers within the Statute, as Constables, &c. and their Assistants must be laid in the proper County, 111, 112, 113, 114, 115, 116, 117

### Tryal.

1. Actions upon Bond or Deed, made in *Wales*, *Ireland*, *Normandy*, &c. where to be brought, 413

### Tythes.

1. Though Tythes pass by Deed only, yet where a Rectory and the Tythes *de D.* are granted, if there is not Livery, neither the Rectory nor Tythes will pass, because they were intended to be granted together, 197
2. There can be no primary and immediate Occupancy of Tythes, 191, 194
3. A Rent cannot be reserved out of a bare Tythe only, to make the Lease good within the 13 *Edw. cap. 10.* because neither

## The Table.

neither a Distress nor Assise can  
be brought thereof, 204

**Verdict, See Evidence,  
Issue.**

1. **T**HE Jury may find a Deed or a Will, the Contents thereof being proved by witnesses, 77
2. But if they will collect the Contents of the Deed, and by the same Verdict find the Deed *in hac Verba*, the Court is not to adjudge upon their Collection, but the Deed it self, *ibid.*
3. A Deed or Will must not be found in part, because the Court cannot but adjudge upon the whole matter, and not upon part only, 84
4. The legal Verdict of the Jury is finding for the Plaintiff, or the Defendant: and what they answer, if asked, concerning some particular Fact, is no part of their Verdict, 150
5. In a general Verdict, finding the point in Issue by way of Argument, although never so concluding, is not good, 75, 187
6. In a Special Verdict the Case in Fact must be found clear, to a common intent, without Equivocation 75, 78, 87
7. The Issue was, Whether a Copyhold was grantable to three

for the lives of two; The Jury find that it is grantable for Three Lives; this was argumentative only, and therefore a void Verdict, 87

8. Where a man by Lease reciting a former Lease to have been made, doth Demise for Forty years after the Expiration of that Lease, paying the same Rent as is mentioned in the recited Lease, and only the Lease for Forty years, and not the recited Lease, is found in the Verdict: This Verdict is a void Verdict, and findeth neither the one or other Lease, 74, 75, 76, 81, 82

**Vintners, See Title  
Statute 21.**

1. The King could not better answer the end of the Act of 7 E. 6. than to restrain the Sellers of Wine to Freemen of London.
2. To the Corporation of Vintners, men bred up in that Trade, and serving Apprenticeships to it, 355
3. And that such should be licensed, without restraint, is most agreeable to the Law of the Kingdom, which permits not persons, who have served Seven years to have a way of livelihood, to be hindered in the Exercise of their Trades, 356

P p p

Toucher;



## The Table.

### Voucher, Vouchee.

1. No man shall Vouch, who is not privy to the Estate (that is) who hath not the same Estate, as well as the Land to which the warranty was annexed, 384
2. When a man will be warranted by Voucher, he must make it appear how the warranty extends to him, 385

### Use, See Title Statutes 19.

1. The Statute brings the new Uses raised out of a feigned possession, and for no time in the Conizee, to the real possession, and for all times in the Conizors, which operates according to their Intents to change their Estates, but not possessions, 42
2. By the Statue of 27 H. 8. the Use and Possession come instantly together, 50
3. The principal use of the Statute of Uses, is to introduce a general form of Conveyance, by which the Conizors of the Fine may execute their purposes at pleasure, 50
4. An old Use may be revoked, and a new Use raised at the same time, 42
5. Uses declared by Indenture made a year after the Recovery, 51

6. If a Fine be levied of the Reversion of Land, or of a Rent to Uses, the *Cestuy que use* may Distrain without Attornment, 50, 51

7. A Rent may arise out of the Estate of *Cestuy que use* upon a Recovery, which was to arise out of the Recoverers Estate, 52

### Usurpation.

1. A void presentation makes no Usurpation, when the Kings Presentation gains a Title by Usurpation, 14
2. If a man, in time of Vacancy, present his Clerk, who is admitted, instituted, and inducted, he gains a good Title to present by Usurpation when the Church becomes next void, 10, 11, 12, 15, 57

### Wager of Law.

1. A Man can never wage his Law for a Demand which is uncertain, because he cannot swear he paid that which consisted of Damages only, 101
2. Debt lies against an Executor for Attorneys Fees, because there the Testator could not wage his Law, 99

### Wales.

## The Table.

Wales, See Title  
Statute, 7, 9, 15.

1. *Wales*, after the Conquest of it by *Edward* the First, was annexed to *England*, *Jure Proprietatis*, 300
2. It received Laws from *England* as *Ireland* did, and differs nothing from it, but only in *Ireland* having a Parliament, 300, 301
3. *Wales*, before the Conquest of it by *England*, was governed by its own Laws, 399
4. When *Wales* came to be of the Dominion of the Crown of *England*, and what Laws they were then obliged to, 399, 400, 402, 415,
5. Process in *Wales* differs from Process in *England*, 400, 412
6. That the Summons of Inhabitants in *Wales*, and the Tryal of an Issue arising there should be by the Sheriff of the next adjoining County, was first ordained by Parliament, and not at the Common Law, 404, 408, 412
7. This Ordinance extended not to all *Wales*, but only to the Lordships Marchers there, neither did it extend to the Body of the Principality of *Wales*, to which the Statute of *Rutland* only extended, 405, 408, 411, 412
8. Where the Land is part of the Principality of *Wales*, it was subject to the Laws of *Wales*;

but when it is held of the King, then there was no remedy but in the Kings Courts, 405, 406, 408

9. If a Signiory in *Wales* was to be tryed, it should be tryed by the Common Law; but if Lands were held of the Signiory, it should be tryed within the Mannor, 407
10. All *Quare Impedit* for disturbance to Churches in *Wales*, within the Lordships Marchers only, were tryable in *England*, and not in *Wales*, 409, 410
11. The Bishops of *Wales* were originally of the Foundation of the Prince of *Wales*, 411
12. By the 26 H. 8. Power is given to Indict, Outlaw, and Proceed against Traytors and Felons, &c. within the Lordships Marchers of *Wales*, and to be indicted in the adjoining County, but not against Offenders within the Principality, 413
13. What alterations have since been made by the 27 H. 8. and 1 E. 6. cap. 10. 414, 415, 416, &c.
14. The uniting and incorporating of *Wales* to *England*, doth not thereby make the Laws used in *England* extend to *Wales*, without more express words, 415
15. Since the Act of 27 Hen. 8. the Courts at *Westminster* have less Jurisdiction in *Wales* than they had; for as they before had Jurisdiction in all the Lordships Marchers; they now have only in these four Counties there-

## The Table.

- in particularly mentioned, but none over the rest, 417
16. No *Fieri Facias*, *Capias ad satisfaciendum*, or other Judicial Process did run into *Wales*, but only an Outlawry and an Extent had gone, 397, 412, 414
17. A Judgment given in *Wales*, shall not be executed in *England*, 398
18. The Lordships Marchers did lye betwixt the Shires of *England* and the Shires of *Wales*, 415
19. To what Counties and Places the Lordships Marchers in *Wales* are now annext by the 27 H. 8. 415

### Warrantia Charta.

1. No man shall have a *Warrantia Charta* who is not privy to the Estate, that is, who hath not the same Estate as well as the Land to which the warranty was annexed, 384

### Warranty, See Title Statutes 5, 6.

1. *Dedi & Concessi* is a warranty in Law, 126
2. Where there is a warranty in Law, and an express warranty, it is at the election of the party to take advantage of either, 126, 127
3. At the Common Law the distinction of a lineal and collateral warranty was useless and unknown; and as to any effect of Law, there was no difference be-

- tween a lineal and collateral warranty, but the warranty of the Ancestor descending upon the Heir, be it the one or the other did equally bind, 366
4. The warranty of Tenant Tayl descending upon the Donor, or his Heirs, is no barr in a *Formedon* in Reverter brought by them, although it be a collateral warranty, 364, 365, 368
5. The warranty of Tenant by the Courtesie barrs not the Heir, if the Father leave not Affets to descend in Recompence, 365
6. The lineal warranty of Tenant in Tayl shall not bind the right of the Estate Tayl by the Statute *de Donis*, neither with or without Affets descending, 365, 366
7. The Statute *de Donis* restrains not the warranty of Tenant in Tayl, from barring him in the Remainder in Tayl by his warranty descending upon him, 367 As to him in Remainder in Tayl the warranty of the Donee is collateral, and binds as at the Common Law, 367, 377, 379, 381
8. No Issue in Tayl is defended from the warranty of the Donee or Tenant in Tayl, but such as are inheritable to the Estates intended within that Statute, and no Estates are so intended, but such only as had been Fee-simples conditional, 369
9. The Statute *de Donis* preserves the Estate Tayl for the Issue or the Reversion for the Donor, against the alienations of the Donee or Tenant in Tayl, with or with-

## The Table.

- without warranty, but not absolutely against all warranties that might barr them; for it hath not restrained the collateral warranty of any other Ancestor, 369, 370, 377, 379, 381
10. An alienation with warranty, which shall hinder the Land from reverting to the Donor or his Heirs, is expressly forbidden by the Statute *de Donis*, 374
11. No mans warranty doth bind directly, & *a priori*, because it is lineal or collateral; for no Statute restrains any warranty under those terms from binding, nor no Law institutes any warranty in those terms, but those are restraints by consequent only, from the restraints of warranties made by Statute, 375
12. The Statute *de Donis* makes no difference between a Donor stranger, and a Donor privy in blood to the Donee, but the warranties are the same in both Cases, 378
13. The Tenant in possession, may Rebut the Demandant without shewing how he came to the possession which he then hath when impleaded, be it by disseisin or any other tortious way; but he must shew how the warranty extended to him, 385, 386
14. If a man will be warranted by a Rebutter, he must make it appear how the warranty extends to him, but he need not have the like estate in the Land upon a Rebutter, as upon a Voucher, 385
15. The Tenant in possession shall not rebut the Demandant by the warranty, without he first make it appear that the warranty did extend to him as Heir or Assignee, 385, 386, 387, 388
16. Where a man is once entituled to the warranty, whatsoever Estate he had when impleaded, he might rebut, though he could not vouch, 386
17. Tenant in possession setting forth how the warranty extends to him, needs not set forth by what Estate or Title he is in possession, 387
18. A warranty may be extinguished several ways {  
by Release,  
by Defeazance,  
by Attainder,  
by Re-foffment of the Warrantor or his Heirs, 387  
And where the Estate to which it is annexed is determined, 389
19. If the warranty be destroyed, the Rebutter, which is the incident to it, is likewise destroyed, 387, 392
20. Feoffees are seised to the use of A. for his life, afterwards to the use of his wife for her life, and after to the use of the right heirs of A. and when by the Statute of Uses the possession is brought to these Uses, the warranty by A. to the Feoffees and their heirs is wholly destroy'd, 389
21. But if it had been made to them and their Assignees, it were more colourable than to them and their Heirs only, 390
22. Where the warranty cannot attach the Ancestor, it shall never attach the Heir, *ibid.*
23. Where a warranty is made to a man and his heirs, his Assignee can take no advantage of it, *ibid.*
24. The Warranty being an incident to the Estate warranted, shall accompany



## The Table.

- company it where the Law disposeth the Estate and Lands warranted to all intents, 392
25. Such persons who come to the Estate *dispositione legis*, are not properly in the post, *ibid.*
26. There are some persons who may rebutt, and perhaps vouch, who are neither Heirs, nor formally Assignees, but have the Estate warranted *dispositione legis*, as Tenant *pur le Curtesie*, Tenant in Dower, &c. 390, 391, 392

**Wife**, See Baron & Feme.

**Will**, See Devise.

**Witnesses**.

1. A Witness swears but to what he hath seen or heard generally; or more largely to what hath fallen under his Senses, 142

**Writ**, See Abatement of Writs.

1. *Brevia Mandatoria, & Non Remedialia*, are Writs that concern not the Rights or Properties of the Subject, but the Government and Superintendency of the King, 401
2. No person shall have a Writ to the Bishop, except his Title appears plainly, 60
3. In a *Quare Impedit* the Plaintiff and

Defendant are both Actors, and may each of them have a Writ to the Bishop, 6, 7

4. In a *Quare Impedit*, if all the Defendants plead *Ne disturba pas*, the Plaintiff may pray a Writ to the Bishop, or maintain the disturbance for damages, 58
5. A Writ to the Bishop *Non obstante Reclamatione*, 6
6. Judges ought not, *ex Officio*, to abate Writs, 95

**Wreck**, See Title Statutes 25.

1. By the Common Law all wreckt Goods were the Kings, and therefore are not chargeable with any Custome, 164
2. Wrecks are such Goods as are cast on Land, and have no other owner or proprietor but who the Law makes, *viz.* the King or Lord of the Mannor, but they have not an absolute property until after a year and a day, 168
3. Goods which are wreck, are not liable to pay any Custome by *Car.* 2. nor any other Law, 165, 166, 171, 172
4. A man may have wreck by prescription, 164
5. Goods derelict may be wreck, 163

F I N I S.

E R R A T A.

Page 10. in marg. r. 269. p. 45. l. 21. r. Cafe. p. 107. l. 3. r. March. p. 157. in marg. r. Magna Chart. p. 161. l. 35. r. resolved. *ibid.* l. 35. r. searches. p. 183. in marg. r. 89. p. 208. l. 23. r. knowledge. l. 36. r. 23. p. 210. l. 22. r. fourth. p. 337. l. 11. r. poyar. p. 359. l. penult. r. by the. p. 383. l. 12. r. Croke. p. 390. l. 38. r. Institutione. p. 410. l. 26. r. unq. p. 420. l. 3. r. of.

A TABLE of the Names of the Principal  
CASES contained in this BOOK.

B.		N.				
B	<i>Edle</i> verf. <i>Constable</i>	177	S	<i>Ir Henry North</i> verf. <i>Coe</i>	251	
	<i>Bole</i> & alii verf. <i>Horton</i>	360				
	<i>Busbels</i> Case	135				
C.		P.				
C	<i>Rawe</i> verf. <i>Ramsay</i>	274	P	<i>Rice</i> verf. <i>Braham</i> & alios	106	
	<i>Crawley</i> verf. <i>Swindley</i> & alios	173				
D.		R.				
D	<i>Ixon</i> verf. <i>Harrison</i>	36	R	<i>Owe</i> verf. <i>Huntington</i>	66	
E.		S.				
E	<i>Des</i> verf. the Bishop of <i>Exon</i> ,	18	S	<i>Hephard</i> verf. <i>Gosnold</i> & alios,	159	
	<i>Edgcombe</i> verf. <i>Dee</i>	89		<i>Shute</i> verf. <i>Higden</i>	129	
				<i>Stiles</i> verf. <i>Coxe</i> & alios	111	
G.		T.				
G	<i>Ardner</i> verf. <i>Sheldon</i>	259	S	<i>Ir John Tuston</i> verf. <i>Sir Richard Temple</i>	1	
				<i>Tristram</i> verf. Viscountess <i>Baltinglasse</i>	28	
				<i>Thomas</i> verf. <i>Sorrell</i>	330	
H.		W.				
H	<i>Ayes</i> verf. <i>Bickerstaff</i>	118	C	<i>Concerning</i> Process out of the Courts of <i>Westminster</i> into <i>Wales</i>	395	
	<i>Harrison</i> verf. <i>Dr. Burrell</i> ,	206				
	<i>Hill</i> verf. <i>Good</i>	302				
	<i>Holden</i> verf. <i>Smallbrook</i>	187				
K.						
T	<i>He King</i> verf. Bishop of <i>Worcester</i> ,	53				